Supreme Court, U.S.
FILED

No. 031269 MAR 2 - 2004

In the Supreme Court of the United States

ALFRED CASTELLANO,

Petitioner,

v.

CHRIS FRAGOZO, and MARIA SANCHEZ

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a 42 U.S.C. § 1983 malicious prosecution claim exists under the Fourth Amendment.

2. What damages are recoverable under a Section 1983 malicious prosecution claim under the Fourth Amendment?

3. Whether FED. R. CIV. P. 51 requires a plain error review where the Respondents failed to object to the jury charge, stating distinctly the matter objected to and the grounds of the objection, and if so, whether the jury instruction in this case constitutes plain error?

4. Whether the *Parratt* doctrine prohibits a federal remedy under the Due Process Clause of the Fourteenth Amendment where state common law provides an adequate remedy.

PARTIES TO THE PROCEEDINGS

Petitioner, Alfred Castellano was the Respondent in the Fifth Circuit below. Respondents, Chris Fragozo and Maria Sanchez, were Petitioners below. The City of San Antonio and Alfred Castro were defendants in the trial court but were not parties the proceeding below.

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The Fifth Circuit's en banc decision is published at *Castellano v. Fragozo,* 352 F.3d 939 (5th Cir. 2003). (Pet. App. 2a).[1] No party sought rehearing of the en banc panel's decision. The Fifth Circuit's opinion granting Respondent's Petition for Rehearing En Banc is published at *Castellano v. Fragozo*, 321 F.3d 1203 (5th Cir. 2003). (Pet. App. 73a) The Fifth Circuit panel original decision is published at *Castellano v. Fragozo,* 311 F.3d 689 (5th Cir. 2002). (Pet. App. 75a) The District Court's Order of Judgment is unpublished. (Pet. App. 165a).

STATEMENT OF JURISDICTION

The Fifth Circuit issued its en banc decision on December 5, 2003. (Pet. App. 2a). This Petition for Writ of Certiorari was timely filed. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AMENDMENTS & STATUTORY PROVISIONS INVOLVED

The Fourth Amendment requires: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." U.S. Const. amend. XIV, § 1.

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[1] Pet. App. refers to Petitioner's Appendix.

The Fourteenth Amendment Due Process Clause provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. Const. amend. XIV, § 1.

Section I of the Civil Rights Act of 1871, as amended provides: "Every person who, under color any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . ." 42 U.S.C. § 1983 (2000).

Federal Rule of Civil Procedure 51 states in relevant part: ". . . No party may assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. . ."

STATEMENT OF THE CASE

The en banc panel of the Fifth Circuit Court of Appeals fairly summarized the facts of this case:

> "All of this stems from a case drawn from the entangled lives of Alfred Castellano, Maria Sanchez, a trusted employee, and Chris Fragozo, a City of San Antonio police officer who did security work for Castellano's chain of fast order restaurants around the city of San Antonio called Fred's Fish Fry. Castellano worked for his father in starting the business, primarily offering fried catfish and chicken to go.

There were three stores when his father died and eighteen on October 31, 1984, when one of the restaurants, Number 7, burned. By this time, Castellano's business was prospering and he held a prominent citizen's position on the Fire and Policy Civil Service Commission, hearing appeals of police personnel from decisions of the Chief of Police.

Officer Castro, a veteran police officer and member of the Arson Squad, quickly determined that the fire had been intentionally set and was an "inside job." That it was arson has never been an issue. The investigation led to Castellano, largely on the testimony of Maria Sanchez and a tape recording she produced with a recorder supplied by Fragozo.

Castro and his partner took the case to the District Attorney, who prepared and, along with Castro, signed an affidavit. Castro presented the affidavit to a magistrate judge who issued an arrest warrant. Castro arrested Castellano, taking him to the police station. He was released a few hours later after being booked and facing an array of cameras. A later examining trial found probable cause to proceed. A grand jury indictment and trial followed. Castellano was convicted in a prominent jury trial by a state court jury in San Antonio and sentenced to five years probation.

Through out Castellano denied involvement in the arson. His story was that he fired Maria when she refused to take a polygraph, a company policy when money was missing; that Maria and Fragozo were lovers; and that he had refused to give Fragozo a copy of a police examination that Fragozo had to pass for

promotion. Maria's story was the Castellano had sought her help in the arson and she taped conversations with him to protect herself if he did burn the restaurant.

In 1993, on his third habeas attempt, the Texas Court of Criminal Appeals set aside the conviction and remanded the case to the trial court. The District Attorney then dismissed the case for 'lack of sufficient evidence,' a predictable outcome given the findings of the state habeas judged adopted by the Texas Court of Criminal Appeals.

The findings included:

> Chris Fragozo, a police officer with the City of San Antonio, attempted to enlist Clemencia Jiminez as a witness against Applicant and aided Maria Sanchez in altering the tape recordings offered into evidence. The tapes were altered to appear that the Applicant was admitting to the arson when in fact he had no knowledge of its commission.
>
> Maria Sanchez and Chris Fragozo collaborated together and without their testimony and the altered tapes, there is insufficient evidence to sustain a finding of guilt in this case."

(Pet. App. 4a-6a)

Following the dismissal of charges, Castellano filed suit in the District Court of the 288th Judicial District, Bexar County, Texas, against Sanchez, Fragozo and Castro, in both their individual and official capacities, and the City of San

Antonio. Castellano claimed in this § 1983 suit that the defendants were guilty of malicious prosecution and had denied him rights secured by the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. (Pet. App. 6a).

The magistrate judge dismissed prior to trial all claims except the Fourth Amendment claim for malicious prosecution. (Pet. App. 7a). The case was tried to a seven-person jury, which returned a verdict awarding $3,000,000 in compensatory damages and $500,000 in punitive damages against Sanchez and Fragozo while exonerating Officer Castro. A divided panel of the Fifth Circuit Court of Appeals affirmed the verdict in its entirety. (Pet. App. 75a).

On rehearing, en banc, the Court held that malicious prosecution standing alone is no violation of the United States Constitution, and that to proceed pursuant to 42 U.S.C. § 1983 such a claim must rest upon a denial of rights secured under the federal and not state law. (Pet. App. 2a). The en banc panel reversed and remanded, concluding "this verdict can not stand resting solely on the Fourth Amendment for the reason the award of damages does not distinguish between trial and pretrial events." (Pet. App. 42a-43a). The en banc panel further held that Castellano was entitled on remand to pursue his malicious prosecution claim under the Fourteenth Amendment Due Process Clause as well. Finally, the Court remanded to allow Castellano to re-plead his state law claims for malicious prosecution. (Pet. App. 43a-44a).

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10 identifies two circumstances in which the Court should exercise its discretion to grant a petition for writ of certiorari that are applicable here; (1) a "United States court of appeals has entered a decision in

conflict with the decision of another United States court of appeals on the same important matter . . ."; and (2) the court of appeal's opinion "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory powers . . ." Each of these considerations arise in this case.

Federal jurisprudence analyzing constitutional "malicious prosecution" claims based on the Fourth and Fourteenth Amendment is hopelessly irreconcilable because of *Albright v. Oliver,* 510 U.S. 266 (1994). Since *Albright,* the circuit courts in an indecipherable array of conflicting precedents have upheld and struck down numerous malicious prosecution verdicts. Private citizens continue to incur substantial legal fees and expenses, and many, like the Petitioner, wade through the morass of malicious prosecution litigation for years, only to have the various courts, like the Fifth Circuit, "pulled the legal rug" out from under them and "change the rules of the game" on appeal. (Pet.App 44a).[2] Ten years after *Albright,* the time has come for the Court, respectfully, to resolve once and for all that the constitutional basis for a Section 1983 claim where a state actor commits perjury, fabricates evidence, and withholds exculpatory evidence to maliciously prosecute an innocent person.

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[2] On the other side, the Court recently denied certiorari after the Seventh Circuit affirmed a $15 million verdict against two Chicago police officers. *Newsome v. McCabe,* 256 F.3d 747, 751 (7th Cir. 2001).

1. Review is warranted because the United States courts of appeal are hopelessly lost in the application of *Albright* to §1983 malicious prosecution claims

This Court first considered whether federal law provides a remedy for an allegedly unconstitutional prosecution in *Albright v. Oliver*, 510 U.S. 266 (1994). The petitioner alleged that a police officer initiated a groundless charge against him. *Id.* at 269. Albright surrendered to police after learning that a warrant had been issued, and he was arrested. *Id.* The court found probable cause to try Albright after a hearing at which Oliver, a police officer, provided misleading testimony. *Id.* at 269. The charges, however, were dismissed prior to trial. *Id.* Albright successfully sued Oliver under Section 1983, alleging he was deprived of his Fourteenth Amendment substantive due process right to be free from criminal prosecution except on probable cause. *Id.*

This Court reversed and rendered, holding that no Fourteenth Amendment existed under the facts of the case. The Court, however, did not reach a majority on any issue. 510 U.S. at 266. Chief Justice Rehnquist wrote the plurality, which was joined by Justices O'Conner, Scalia, and Ginsberg. Justices Scalia, Ginsberg and Souter each wrote separate concurrences. Justice Kennedy, joined by Justice Thomas, also concurred in a separate opinion. Justice Stevens dissented, joined by Justice Blackman.

In dismissing Albright's claim, the Court's opinion is precise and narrow: "[I]t is the Fourth Amendment, and not substantive due process, under which the petitioner Albright's claim must be judged." *Id.* at 271. (plurality opinion) (Kennedy, J. concurring). The Court reasoned that "[w]here a particular Amendment 'provides an explicit textual source

of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'" *Id.* at 273 (*quoting Graham v. Conner,* 490 U.S. 386, 395 (1989)).

Presaging the disarray to come from the Court's internal split, Chief Justice Rehnquist warned against reading too much into the Court's opinion:

> "Petitioner's claim before this Court is a very limited one. He [petitioner] claims that the action of respondents infringed on his ***substantive*** due process right to be free of ***prosecution*** without probable cause. He does not claim that Illinois denied him the ***procedural*** due process guaranteed by the Fourteenth Amendment. Nor does he claim a violation of his Fourth Amendment rights, notwithstanding the fact that his surrender to the State's show of authority constituted a seizure for purposes of the Fourth Amendment."

Albright, 510 U.S. at 271 [emphasis added]. The Court cautioned against efforts to apply the Court's opinion to Section 1983 claims asserted under the Fourth Amendment as well:

> "We express no view as to whether petitioner's claim would succeed under the Fourth Amendment, since he has not presented that question in his petition for certiorari."

Id. at 275.

Justice Scalia, concurring, did not rule out that in certain circumstances a malicious prosecution claim could be asserted as a Fourteenth Amendment procedure due process claim: "I think it unlikely that the procedures constitutionally 'due,' with regard to an arrest, consist of anything more than what the Fourth Amendment specifies; but petitioner has in any case not invoked 'procedural due process.'" *Id.*, at 275 (Scalia, J. concurring).

Justice Ginsberg wrote separately to explain her understanding that at common law an unreasonable seizure extended beyond arraignment to the point at which the person was released from official custody. *Id.*, at 276-78 (citing 2 M. Hale, Pleas of the Crown and 4 W. Blackstone, Commentaries). Justice Ginsberg's concurrence implies that in her view a malicious prosecution plaintiff may recover under the Fourth Amendment alone for all future damages that flow from the unlawful seizure until the point of release from official custody post-conviction.

Justice Kennedy, joined by Justice Thomas, concurred in the plurality. *Id.* at 281. They concluded, however, that the case should have been dismissed because a state actor's random and unauthorized deprivation of the petitioner's due process rights, if any, could not be challenged under Section 1983 so long as the State provided an adequate post-deprivation remedy, which Illinois did. *Id.* at 284 (citing *Parratt v. Taylor,* 451 U.S. 527, 535-544 (1981).[3]

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[3] Justice Kennedy and Thomas also assumed without deciding that some of the interests granted historical protection by the common law of torts (such as freedom from defamation an malicious prosecution) are protected by the Due Process Clause. *Id.* at 284 ("The common law of torts long recognized that a malicious prosecution, like a defamatory statement, can cause unjustified

Justice Souter's concurrence reached the same result as the plurality but by a different route. *Id.* at 819-20.

> "None of these injuries, however, is alleged to have followed from the issuance of the formal instrument of prosecution, as distinct from the ensuing assertion of custody. Thus, petitioner has not shown a substantial deprivation of liberty from mere initiation of prosecution. The significance of this failure follows from the recognition that none of the petitioner's alleged injuries has been treated by the Courts of Appeals as beyond the ambit of compensability under the general rule of 42 U.S.C § 1983 liability for a seizure unlawful under Fourth Amendment standards. *(citations omitted)*. On the contrary, the Courts of Appeals have held that injuries like those petitioner alleges are cognizable in Section 1983 claims founded upon arrests that are bad under the Fourth Amendment."

Id. at 289-90, *citing Hale v. Fish,* 899 F.2d 390, 403-404 (5th Cir. 1990) (affirming award of damages for mental anguish, harm to reputation, and legal fees for defense).

Finally, Justices Stevens and Blackmun join in dissenting. They concluded that Albright's Fourteenth Amendment substantive due process claim should not be dismissed because (1) the commencement of formal criminal proceedings deprives the accused person of "liberty" as that term is used

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torment and anguish – both by tarnishing one's name and by costing the accused money in legal fees and the like." *Id.* at 283 (Kennedy, J. concurring) (*citing* W. Keeton et al., Prosser and Keeton on Law of Torts § 119, pp. 870-889 (5th ed. 1984); T. Cooley, Law of Torts 180-187 (1879)).

in the Fourteenth Amendment, and (2) the demands of "due process" are not satisfied solely by compliance with certain procedural formalities that ordinarily ensure the prosecution will not commence absent probable cause. *Id.* at 294-300.

> "In short, an official accusation of serious crime has a direct impact on a range of identified liberty interests. That impact, moreover, is of sufficient magnitude to qualify as a deprivation of liberty meriting constitutional protection."

Id. at 297.

> "Even if prescribed procedures are followed meticulously, a criminal prosecution based on perjured testimony, or evidence on which no 'rational trier of fact,' could base a finding of probable cause (citation omitted) simply does not comport with the requirements of the Due Process Clause."

Id. at 300. The dissent does not state whether they would have allowed Albright's claim to proceed under the Fourth Amendment.[4]

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[4] Justice Stevens also forcefully rejects Justice Kennedy's application of *Parratt* because this doctrine only applies to "the ordinary common-law tort that can be committed by anyone" and not "to officially authorized deprivations of liberty or property." *Id.* at 313.

A. The courts of appeal's post-*Albright* opinions are conflicting and hopelessly irreconcilable

At least 11 circuits have struggled post-*Albright* to craft a workable framework for constitutional "malicious prosecution" claims. The disarray among opinions is legendary. *See Taylor v. Meacham,* 82 F.3d 1556, 1561 (10th Cir.), *cert. denied*, 519 U.S. 871 (1996) (noting an "embarrassing diversity of judicial opinion . . ."). Some circuits still remain internally inconsistent from panel to panel. *See Thacker v. City of Columbus,* 328 F.3d 244, 258-59 (6th Cir. 2003) (noting that contrary to binding circuit precedent, some panels do not recognize a § 1983 claim for malicious prosecution, and stating that the circuit has yet to define the elements of a federal malicious prosecution claim). As noted by the en banc panel, other circuit courts remain undefined except for a vague insistence on a constitutional violation. *See Pace v. City of Des Moines,* 201 F.3d 1050, 1055 (8th Cir. 2000) ("It is well established in this circuit that an action for malicious prosecution by itself is not punishable under § 1983 because it does not allege a constitutional inquiry.").

In the case at hand, the Fifth Circuit reversed more than 30 years of precedent that recognized a constitutional right to be free from "bad faith prosecutions."[5] For more than 12 years, the Fifth Circuit explicitly held that "malicious prosecution may be a constitutional tort if all of its common law elements are established." *See Brummett v. Camble,* 946 F.2d 1178, 1183 (5th Cir. 1991). The Court had reaffirmed the circuit's rule of law post-*Albright* as recently as June

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[5] *Shaw v. Garrison,* 467 F.2d 113, 120 (5th Cir. 1972).

2002: "the elements of the state-law tort of malicious prosecution and the elements of the constitutional tort of Fourth Amendment malicious prosecution are coextensive." *Gordy v. Burns,* 294 F.3d 722 (5th Cir. 2002), *citing Piazza v. Mayne,* 217 F.3d 239, 245 (5th 2001).

And yet, with no post-*Albright* direction from this Court that its prior precedent was erroneous, the Fifth Circuit sitting en banc in the first malicious prosecution case after *Gordy* charts a "new path" and "changed the game" on Petitioner. (Pet. App.16a and 46a). In so doing, the Court reversed what is believed to be the largest malicious prosecution verdict in circuit history[6] and denied the wrongfully convicted Petitioner the justice he had waited 20 years to achieve.[7] Such whimsical jurisprudence sets constitutional law on its head.

Of the circuits that have considered the issue post-*Albright,* five interpret *Albright* to require that a malicious prosecution claim be based exclusively on the Fourth Amendment. *See Nieves v. McSweeney,* 241 F.3d 46, 53-54 (1st Cir. 2001); *Fulton v. Robinson,* 289 F.3d 188, 195 (2nd Cir. 2002); *Lambert v. Williams,* 223 F.3d 257, 262 (4th Cir. 2000), *cert. denied,* 531 U.S. 1130 (2001); *Uboh v. Reno,* 141 F.3d 1000, 1002-04 (11th Cir. 1998); *Taylor v. Meacham,* 82 F.3d 1556, 1561 (10th Cir.), *cert. denied,* 519 U.S. 871 (1996).

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[6] A unanimous jury awarded Petitioner $3 million dollars in actual damages and $500,000 in punitive damages split evenly between the Respondents. (Pet. App. 165-66a).

[7] In this case, "at every step of litigation, [the Petitioner] conscientiously attempted to conform to this court's decisions and to accomplish the ultimately impossible task of harmonizing our case law with that of the Supreme Court" (Pet. App. 46a).

The Fifth Circuit was previously among these courts. *See Gordy,* 294 F.3d 722. The Fifth Circuit now joins three other lower courts that hold a Section 1983 plaintiff, under certain facts, may pursue a claim under both the Fourth and Fourteenth Amendment despite the apparent holdings of *Albright.* 510 U.S. 266 (plurality opinion) (Scalia, J. concurring). *See Torres v. McLaughlin,* 163 F.3d 169, 193 (3rd Cir. 1998), *cert. denied,* 528 U.S. 1079 (2000) and *Frantz v. Village of Bradford,* 245 F.3d 869, 875-77 & n. 2 (6th Cir. 2001.)[8] *Newsome v. McCabe,* 256 F.3d 747, 751 (7th Cir. 2001). The Second Circuit has not ruled out that it may yet join this group. *Singer v. Fulton County Sheriff,* 63 F.3d 110, 116 no. 5 (2nd Cir. 1995). The Eighth and Ninth Circuits have not clearly decided whether they would permit a Fourteenth Amendment claim.

As the Fifth Circuit correctly observed, two broad approaches to Section 1983 malicious prosecution claims have evolved post-*Albright.*[9] (Pet. App. 18a). The first approach is a blend of federal constitutional and state common law, requiring both proof of a constitutional violation and proof of the common law elements of malicious prosecution based on the state law where the offense took place. The second approach considers malicious prosecution claims

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[8] The Sixth Circuit's opinion in *Frantz* must be called into question, however, because it was based on the substantive component of the Fourteenth Amendment, which *Albright* presumably prohibits. 245 F.3d at 875-77.

[9] Prior to *Albright,* most of the lower courts already recognized some form of a of malicious prosecution actionable pursuant to Section 1983. The disagreement among the courts concerned whether malicious prosecution, standing alone, violated the Constitution. *Albright,* 510 U.S. at 271 fn 4.

unenforceable under Section 1983 without proof of a constitutional violation, looking to state common law elements only on a case-by-case basis as necessary to enforce the specific constitutional violation alleged.

Six circuits compose the first broad group. They universally hold that a Section 1983 plaintiff must prove a Fourth Amendment violation and all the elements of the state-law tort of malicious prosecution of the state where the claim arose. *See Nieves v. McSweeney,* 241 F.3d 46, 53-54 (1st Cir. 2001); *Fulton v. Robinson,* 289 F.3d 188, 195 (2nd Cir. 2002); *Donahue v. Gavin,* 280 F.3d 371, 380 n. 16 (3rd Cir. 2002); *Poppell v. City of San Diego,* 1949 F.3d 951, 961 (9th Cir. 1998); *Taylor v. Meacham,* 82 F.3d 1556, 1561 (10th Cir.), *cert. denied*, 519 U.S. 871 (1996); *Uboh v. Reno,* 141 F.3d 1000, 1002-04 (11th Cir. 1998).

The Third Circuit, in light of *Albright,* joined this group, but at least one panel questions the continued wisdom of this approach. *See Gallo v. City of Philadelphia,* 161 F.3d 217, 222 n. 6 (3rd Cir. 1998) ("For instance, if the harm alleged is a seizure lacking probable cause, it is unclear why a plaintiff would have to show that the police acted with malice."). The Eleventh Circuit also has it doubters. In *Whiting v. Traylor,* the court recognized that labeling a Section 1983 claim as malicious prosecution was merely a "shorthand" way to recognize a violation of the plaintiff's Fourth Amendment right to be free from an unlawful seizure, and the injuries caused by such an unlawful seizure as the prosecution proceeds beyond the point of arrest. 85 F.3d 581, 584 (11th Cir. 1996).

Contrary to the assertion of the Fifth Circuit en banc opinion, only the Fourth Circuit unabashedly adopts the second approach. The Fourth Circuit holds that the Section

1983 plaintiff must prove a Fourth Amendment violation and only one state-law element – that the criminal offense terminated in favor of the plaintiff. *See Lambert v. Williams,* 223 F.3d 257, 262 (4th Cir. 2000), *cert. denied,* 531 U.S. 1130 (2001).[10] As noted by the Fifth Circuit, the Eleventh Circuit sometimes also adopts the second approach, looking to the common law elements of the tort "only as needed to assist the enforcement of analogous constitutional violations." *Whiting v. Traylor,* 85 F.3d 581, 585 (11th Cir. 1996) (analyzing state law elements of malicious prosecution to determine when statute of limitations began). *See also Wood v. Kesler,* 323 F.3d 872, 881-82 (11th Cir. 2003).

After *Albright*, the Seventh Circuit expressly rejected the tort of malicious prosecution as a basis for relief under Section 1983 where the police withheld exculpatory evidence, leading to a wrongful arrest. *Newsome v. McCabe,* 256 F.3d 747, 750-51 (7th Cir. 2001) ("whatever scope malicious prosecution may have as a constitutional tort after *Albright*, it does not depend on state law in this way.). The Court held instead that the plaintiff's wrongful conviction claim should be analyzed as a denial of the Fourteenth Amendment right to a fair trial. *Id. See Ineco v. City of Chicago,* 286 F.3d 994 (7th Cir. 2002) and *Bontkowski v. Smith,* 305 F.3d 757 (7th Cir. 2002). The court had no occasion to determine which common law tort elements it would incorporate, if any. *Newsome* at 747.

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[10] Interestingly, as the Fifth Circuit noted, the Fourth Circuit in *Lambert* cites the cases from the First, Second, and Tenth Circuits, for the proposition that they took the same approach that it did, when clearly they did not. (Pet. App. 24a). As noted by the Fifth Circuit, this highlights the lack of understanding of the subtle differences involved, which, nonetheless, are central to the issue presented.(Pet. App. 24a).

B. The Fifth Circuit's "new path" sweeps to broadly in light of *Albright* and misunderstands the damages recoverable under § 1983 for malicious prosecution.

The Fifth Circuit, in this case, inexplicably, reversed itself, reading too broadly *Albright's* command that where there is an "explicit textual source of constitutional protection" exists, that Amendment must guide the analysis of a Section 1983 malicious prosecution claim.

> "Given that the district court dismissed the Fourteenth Amendment claims, albeit erroneously, the verdict cannot be sustained on the Fourth Amendment alone since it rests in part on events at trial – events not protected by the Fourth Amendment."

(Pet. App. 3a). The Fifth Circuit apparently concluded that its decision was compelled because the Petitioner's trial and post-trial damages are beyond the "ambit of compensability" permitted by the Fourth Amendment in Section 1983 claims. (Pet. App. 3a). *See Albright,* 510 U.S. at 289-90 (Souter, J. concurring). The Fifth Circuit cites no other circuit that adopts such a sweeping application of *Albright*. *Albright* itself, of course, is silent on the issue of what damages are recoverable under a Fourth Amendment malicious prosecution claim, if one exists. *Id.* at 275.

Struggling to reconcile the obvious inequity of its erroneous application of law, the Court abandons *Gordy* in favor of a two-step process for the recovery of damages, requiring both proof of a Fourth Amendment unlawful seizure to recover pre-trial damages and a Fourteenth Amendment due process violation to recover post-trial damages:

> "We hold that a state's manufacturing of evidence and knowing use of that evidence along with perjured testimony to obtain a wrongful conviction deprives a defendant of his long recognized right to a fair trial secured by the Due Process Clause, a deprivation of a right not reached by the *Parratt* doctrine." (Pet.App 3a) (*citing Parratt v. Taylor,* 451 U.S. 527 (1981)

Albright admittedly does not foreclose the Fifth Circuit's "new path,"[11] but the Court concedes that *Albright* did not foreclose the trial court's judgment either. *Albright,* however, expressly recognized the lower courts' long-standing tradition of recognizing constitutional malicious prosecution claims and the broad damages permitted therein. *Albright,* 510 U.S. at 271, fn. 4 (*citing Lee v. Mihalich,* 847 F.2d 66, 70 (3rd Cir. 1988); *Sanders v. English,* 950 F.2d 1152, 1159 (5th Cir. 1992); *Robinson v. Maruffi,* 895 F.2d 649 (10th Cir. 1990); *Strength v. Hubert,* 854 F.2d 421, 426, and n. 5 (11th Cir. 1988); *Torres v. Superintendent of Police of Puerto Rico,* 893 F.2d 404, 409 (1st Cir. 1990); *Usher v. Los Angeles,* 828 F.2d 556, 561-62 (9th Cir. 1987); *Coogan v. Wixom,* 820 F.2d 170, 175 (6th Cir. 1987))

The rule in *Gordy* and the trial court's application of it is the constitutional sound approach and more consistent with established Section 1983 precedent. No justice in *Albright* expressed any doubt as to the compensability of all damages proximately caused by a violation of the Fourth Amendment where the police officer in that case gave misleading testimony to cause the wrongful prosecution of Albright.

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[11] Of course, *Albright* questions the existence of a Fourteenth Amendment procedural due process claim altogether. *Albright,* 510 U.S. at 275 (Scalia, J. concurring).

Moreover, neither the Fourth Amendment, Section 1983, or *Albright* creates a bright-line restriction on compensable damages for an unlawful seizure. As Justice Ginsberg noted:

> "The common law thus seems to have regarded the difference between pretrial incarceration and other ways to secure a defendant's court attendance as a distinction between methods of retaining control over a defendant's person, not one between seizure and its opposite. [citations omitted].
>
> "This view of the definition and duration of a seizure comports with common sense and common understanding. A person facing serious criminal charges is hardly freed from the state's control upon his release from a police officer's physical grip. He is required to appear in court at the state's command. He is often subject, as in this case, to the conditions that he seek formal permission from the court (at significant expense) before exercising what would be his unquestioned right to trave outside the jurisdiction. Pending prosecution, his employment prospects may be diminished severely, he may suffer reputational harm, and he will experience the financial and emotional strain of preparing a defense.
>
> A defendant incarcerated until trial no doubt suffers greater burdens. That difference, however, should not lead to the conclusion that a defendant release pretrial is not still "seized" in the constitutionally relevant sense. Such a defendant is scarcely at liberty; he remains apprehended, arrested in his movements, indeed seized for 'trial' so long as he is bound to appear in court and answer the state's charges"

Id. at 278-79 (Ginsberg, J. concurring). This analysis is most applicable in the case of Petitioner, who was convicted and sentenced to five years probation, during which time he remained subject to the state's control.

The rule in *Gordy*, moreover was consistent with this Court's holdings addressing what damages are recoverable under Section 1983 for violations of other constitutional rights. *See Carey v. Pipus,* 435 U.S. 247 (1978). The Court in *Carey* concluded that where the common law of torts closely parallels the interests protected by a particular constitutional right, it is appropriate to look to the common law rules to determine the compensability for injuries sustained because of the deprivation of a constitutional right. *Id.* at 258-59. Plainly, the rights protected by the Fourth Amendment and the common law tort of malicious prosecution are parallel. The common law of malicious prosecution recognizes and accounts for the invidious and subtle injuries proximately caused by the unlawful initiation of criminal proceedings, permitting full recovery of all pre- and post-trial damages for mental anguish, loss of reputation, and legal fees, where the person ultimately is found innocent. *Id.* at 262-63 (discussing defamation *per se* by its very nature likely causes mental and emotional distress, as well as injury to reputation.). Justice Ginsberg wrote separately in *Albright* to clarify this exact issue – that historically, the Fourth Amendment was seen as protecting against the harm caused as long as the person was subject to the states control. *Albright,* 510 U.S. at 276-78. This Court should grant certiorari to decide once and for all the full scope of Section 1983 malicious prosecution claims asserted under either the Fourth Amendment, including whether an injured party is entitled to recover pre- and post-conviction damages.

2. Review is warranted to resolve whether the *Parratt* doctrine applies in the context of the Fifth Circuit's newly recognized Fourteenth Amendment claim:

This Court additionally should grant certiorari, if for no other reason, to decide whether the Fifth Circuit correctly applied the *Parratt* doctrine to its newly-recognized Fourteenth Amendment claim. The Fifth Circuit apparently surmises that despite the seemingly clear dictates of Justice Kennedy's concurrence in *Albright*, he would decide this case is an exception that "implicates fundamental fairness in the determination of guilt at trial." *Albright,* 510 U.S. at 283; (Pet. App. 35a-36a). The Fifth Circuit apparently believes that Justice Kennedy, therefore, would find these are claims in which the federal power ought to be vindicated. (Pet. App. 37a).[12]

Equally troubling on remand, however, is that seven members of the Fifth Circuit retained grave doubts on this

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[12] The Fifth Circuit shamelessly omits from its analysis the critical passage of Justice Kennedy's concurrence:

> "These evasions are unjustified given the clarity of the *Parratt* rule: In the ordinary case where any injury has been caused not by a state law, policy or procedure, but by a random and unauthorized act that can be remedied by state law, there is no basis for intervention under § 1983, at least in a suit based on 'the Due Process Clause of the Fourteenth Amendment *simpliciter*.'"

Albright, 510 U.S. at 285, *quoting Parratt v. Taylor,* 451 U.S. 527, 536 (1981). The Fifth Circuit fails to explain why it considers Petitioner's claim that a police officer lied and fabricated evidence so out of the ordinary that Justice Kennedy would forego *Parratt*.

point, of which four assumed without deciding that the majority was correct:

> "Judge Barksdale powerfully argues that because Texas law affords Castellano an adequate state remedy in a malicious prosecution claim, the *Parratt* doctrine withholds a constitutional remedy. While this position may prove correct, we have no post-*Parratt* guidance on it from the Supreme Court, and several courts have allowed claims like Castellano's to proceed without mention of *Parratt*. For now, I would side with the other appellate courts and concur in this portion of the majority's remand."

(Pet. App. 46-47a). This Court should resolve whether the *Parratt* doctrine applies to a Section 1983 claims pursued under the Fourteenth Amendment claim regardless of whether the state affords an adequate state-law remedy.

3. Review is warranted because the Fifth Circuit wilfully ignored FED. R. CIV. P. 51, departing so far from the accepted and usual course of judicial proceedings to compel this Court to exercise its supervisory power.

All of the questions above should have been moot in this case. The Fifth Circuit, however, deviated from accepted appellate practice and wilfully ignored Federal Rule of Civil Procedure 51, applying an abuse of discretion standard[13]

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[13] A abuse of discretion standard requires that thejury instructions "must demonstrate that the charge as a whole creates substantial and ineradicable doubt whether the jury has been properly guided in its deliberations." *Deines v. Tex. Dep't of Protective & Regulatory Servs.*, 164 F.3d 277, 279 (5th Cir.1999)

rather than plain error review[14] to the jury charge. (Pet. App. 29a-30a). Federal Rule of Civil Procedure 51 unequivocally governs this situation: "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." The Respondents did a lot of things under the "unique circumstances of this case," but they never objected to the jury charge in compliance with FED. R. CIV. P. 51. (Pet. App. 15). The Court first concedes that the Respondents failed to object to the jury charge at trial, but then proceeds to apply an abuse of discretion standard. (Pet. App. 15). To permit a circuit court to state a Federal Rule of Civil Procedure correctly, as here, and then wilfully ignore it and apply a legal standard of its own choosing to reach a predetermined conclusion eviscerates the notion of ordered justice

The jury instruction here survives a plain error review. In explaining the exacting standard for review for plain error, the Fifth Circuit itself in *Tompkins v. Cyr* explained:

(*quoting Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1216 (5th Cir.1995)). A single inaccurate, ambiguous, or incomplete clause does not dictate reversal if the instructions as a whole properly express the law

[14] When review for plain error the court first asks whether the district court committed an error that is "plain" and that affects substantia rights. *United States v. Olano,* 507 U.S. 725, 732 (1993).If those criteria is met, the appellate court has the discretion to correct the forfeited error but should do so only if the error seriously effects the fairness, integrity, or public reputation of judicial proceedings. *Id.*

> "Few jury charges in cases of complexity will not yield 'error' if pored over, long after the fact in the quiet of the library – if such enterprise is to be allowed. It is not. The reality is that most such 'errors' will be washed away if the trial court is given a fair opportunity to consider them. In short, so long as the trial judge gives counsel a fair opportunity to object, we will listen to unobjected to rulings only in those handful of cases that can meet the exacting requirements of plain error. *Olano* and Rule 51 do not technical barriers or lay traps. These rules vindicate powerful interests in orderliness and finality. They also reflect the central role of the United States District Court. It is not a way station or entry gate. Rather, trials are the heart of the system. Trial, not appeal, is the main event. The rules we enforce today tether these statements to reality."

202 F.3d at 784 (5th Cir. 2000), *citing Olano*, 507 U.S. 725.

In this case, the trial court either reintroduced the Fourteenth Amendment claim by using the words "due process" in the submission to the jury in addition to defining the elements of malicious prosecution, or it did not and submitted only the Fourth Amendment malicious prosecution claim. (Pet. App. 167a). Either way, the judgments should be affirmed. Assuming *arguendo* that the Fourteenth Amendment claim was before the jury, the Respondents did not object in compliance with Rule 51, stating distinctly the matter objected to in the charge and the grounds of the objection. The failure to object to the charge properly placed the Fourteenth Amendment before the jury and the jury returned its damages awarded based on that theory of recovery in addition to finding all elements of malicious prosecution.

Assuming an error did occur and the Fourteenth Amendment was mistakenly reintroduced into the case, the error was not clear and obvious. More over, the instruction, if error, did not effect the outcome of this trial as noted by the majority in the panel opinion. "This court can not conceive how using the words 'due process' rather than 'unreasonable seizure,' would have changed the jury's verdicts under the facts of this case." (Pet. App. 97a). Moreover, the jury instruction is not fatally flawed even if a Fourth or Fourteenth Amendment unreasonable seizure is required to be proven.

> "It is pellucid that Castellano would easily satisfy that requirement because the jury found that he was arrested, convicted, and sentenced on the basis of fraudulent evidence. Further, the record contains sufficient evidence that Castellano's seizure was "unreasonable."

(Pet. App. 98a, fn. 33). In other words, applying a plain error review, the jury would have reached the same result even under the new two-part Fourth and Fourteenth Amendment causes of action articulated by the *en banc* panel, and therefore, the judgment should be affirmed. For the reasons stated above, the Fourth Amendment provides ample constitutional support for all pre- and post-trial damages awarded Petitioner. Additionally, this Court should strictly enforce Rule 51 and affirm the judgment on that basis, if no other.

CONCLUSION

The petition for certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50591

[Filed December 5, 2003]

ALFRED CASTELLANO, Plaintiff-Appellee,	)
v.	)
CHRIS FRAGOZO, Etc.; ET AL, Defendants,	)
CHRIS FRAGOZO, Individually and in his Official Capacity as a San Antonio Police Officer; MARIA SANCHEZ, Individually, Defendants-Appellants.	)

Appeals from the United States District Court
for the Western District of Texas
SA-96-CV-346-JWP
John W. Primomo, US Magistrate Judge

Before KING, Chief Judge, and JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, DENNIS, CLEMENT, and PRADO, Circuit Judges.

OPINION

HIGGINBOTHAM, Circuit Judge:

Today we examine our uncertain law attending a claim of malicious prosecution with its undisciplined mix of constitutional and state tort law. We decide that "malicious prosecution" standing alone is no violation of the United States Constitution, and that to proceed under 42 U.S.C. § 1983 such a claim must rest upon a denial of rights secured under federal and not state law.

Alfred Castellano sought damages for his wrongful conviction of arson, asserting claims under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. Before trial the magistrate judge concluded that alleging the elements of malicious prosecution under Texas law stated a claim, but only under the Fourth Amendment. The trial judge passed over defendants' claim of absolute immunity, accepting their argument that the Supreme Court in *Albright v. Oliver*[1] held that if there is an adequate state tort remedy there can be no claim for a denial of due process, and dismissed all claims under any other constitutional provision. With the Texas law of malicious prosecution now the source for his § 1983 claim,

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[1] 510 U.S. 266, 271, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994).

Castellano amended his complaint, dropping his state law claim. A jury returned a substantial award of money damages.

We conclude that the trial court's reading of *Albright*, while clinging to the law of this circuit, simultaneously misread both the Fourth and Fourteenth Amendments. As for the Fourteenth Amendment claims, we reject the trial court ruling that there was no denial of due process, either in its primitive form that § 1983 cannot sustain such a claim, or because the state provides a post-deprivation tort remedy. We hold that a state's manufacturing of evidence and knowing use of that evidence along with perjured testimony to obtain a wrongful conviction deprives a defendant of his long recognized right to a fair trial secured by the Due Process Clause, a deprivation of a right not reached by the *Parratt*[2] doctrine. At the same time, we note that Castellano faces obstacles in pursuing his wrongful conviction claims on remand given that Sanchez and Fragozo enjoy absolute immunity for their testimony at trial and have substantial arguments that their manufacturing of evidence could not have created, without the trial testimony, a wrongful conviction.

Given that the district court dismissed the Fourteenth Amendment claims, albeit erroneously, the verdict cannot be sustained on the Fourth Amendment alone since it rests in part on events at trial -- events not protected by the Fourth Amendment. It is not possible to separate the damages awarded for violations of the Fourth Amendment from those awarded for wrongful conviction. Nor can we sustain the verdict because the jury effectively decided the Fourteenth Amendment claim.

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[2] *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981).

We begin by reciting the history of the case. We then examine the development of malicious prosecution as a claim under § 1983 - including the contours of the state law tort, its early development as a federal claim in this circuit, as well as the impact of *Albright v. Oliver* [3] on this circuit's precedent. After examining our own law, we turn to the law of other circuits and conclude that "malicious prosecution" standing alone is no violation of the United States Constitution. We then return to the case at hand, and in doing so we examine *Albright*, finding no support there for the magistrate judge's ruling that by using the elements of the state tort of malicious prosecution, Castellano's full claim could be tethered to the Fourth Amendment. We conclude by finding that the verdict cannot be sustained and that the case must be remanded for a new trial.

I

1

All of this stems from a case drawn from the entangled lives of Alfred Castellano, Maria Sanchez, a trusted employee, and Chris Fragozo, a City of San Antonio police officer who did security work for Castellano's chain of fast order restaurants around the city of San Antonio called Fred's Fish Fry. Castellano worked for his father in starting the business, primarily offering fried catfish and chicken to go. There were three stores when his father died and eighteen on October 31, 1984, when one of the restaurants, Number 7, burned. By this time, Castellano's business was prospering and he held a prominent citizen's position on the Fire and

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[3] 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994).

Police Civil Service Commission, hearing appeals of police personnel from decisions of the Chief of Police.

Officer Castro, a veteran police officer and member of the Arson Squad, quickly determined that the fire had been intentionally set and was an "inside job." That it was arson has never been an issue. The investigation led to Castellano, largely on the testimony of Maria Sanchez and a tape recording she produced with a recorder supplied by Fragozo.

Castro and his partner took the case to the District Attorney, who prepared and, along with Castro, signed an affidavit. Castro presented the affidavit to a magistrate judge who issued an arrest warrant. Castro arrested Castellano, taking him to the police station. He was released a few hours later after being booked and facing an array of cameras. A later examining trial found probable cause to proceed. A grand jury indictment and trial followed. Castellano was convicted in a prominent jury trial by a state court jury in San Antonio and sentenced to five years probation.

Throughout Castellano denied involvement in the arson. His story was that he fired Maria when she refused to take a polygraph, a company policy when money was missing; that Maria and Fragozo were lovers; and that he had refused to give Fragozo a copy of a police examination Fragozo had to pass for promotion. Maria's story was that Castellano had sought her help in the arson and she taped conversations with him to protect herself if he did burn the restaurant.

In 1993, on his third habeas attempt, the Texas Court of Criminal Appeals set aside the conviction and remanded the case to the trial court. The District Attorney then dismissed the case for "lack of sufficient evidence," a predictable

outcome given the findings of the state habeas judge adopted by the Texas Court of Criminal Appeals.

The findings included:

> Chris Fragozo, a police officer with the City of San Antonio, attempted to enlist Clemencia Jiminez as a witness against Applicant and aided Maria Sanchez in altering the tape recordings offered into evidence. The tapes were altered to appear that the Applicant was admitting to the arson when in fact he had no knowledge of its commission.
>
> Maria Sanchez and Chris Fragozo collaborated together and without their testimony and the altered tapes, there is insufficient evidence to sustain a finding of guilt in this case.[4]

Following the dismissal of charges, Castellano filed suit in the District Court of the 288th Judicial District, Bexar County, Texas, against Sanchez, Fragozo and Castro, in both their individual and official capacities, and the City of San Antonio. Castellano claimed in this § 1983 suit that defendants were guilty of malicious prosecution and had denied him rights secured by the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.

The case was removed to federal court and referred to a magistrate judge, where it was mired in pretrial proceedings over the next six years. During these proceedings, all defendants, except Castro, Sanchez, and Fragozo, were

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[4] *Ex parte Castellano*, 863 S.W.2d 476, 479 (Tex. Crim. App. 1993).

dismissed. And, critically, the magistrate judge's focus was upon the elements of the Texas law of malicious prosecution as sufficient to state a constitutional violation with little examination of particular violation beyond the conclusion that "malicious prosecution" could proceed only under the Fourth Amendment - but not the Fourteenth. This view simultaneously took out the Fourteenth Amendment and overlooked the limits of the Fourth, as we will explain. The case was tried to a seven-person jury, which returned a verdict awarding $3,000,000 in compensatory damages and $500,000 in punitive damages against Sanchez and Fragozo while exonerating Officer Castro. A divided panel of this court upheld the judgment entered on the verdict, and en banc review was granted.

2

The civil trial was a retrial of the criminal case. In large terms the jury was asked to decide whether Castellano was an arsonist or reasonably believed to be so, or rather, whether he was the victim of a conspiracy between Sanchez and Fragozo, joined by Castro, an ambitious cop. The jury plainly was persuaded that Castellano was the victim of Sanchez and Fragozo, but not Castro.

With only the Fourth Amendment claim left in the case, the trial court instructed the jury:

> Castellano claims that Alfred Castro and Chris Fragozo, while acting under color of law, intentionally violated his constitutional right to due process by maliciously prosecuting him for the criminal offense of arson. Castellano further claims that Maria Sanchez, as an individual, intentionally violated the same constitutional right.

The jury was told that Castellano must prove that

> the defendants caused or commenced or aided a criminal proceeding against him; the defendants acted without probable cause; the criminal action terminated in his favor; he was innocent of arson; the defendants acted with malice by prosecuting him for arson; [and] he was damaged by the criminal proceeding.

3

Fragozo and Sanchez argue here that the judgment against them rests on an impermissible blend of state tort and constitutional rights and that Castellano at best has only a Fourth Amendment claim.

Castellano urges that all damages flow from the initial wrongful arrest and seizure in violation of the Fourth Amendment, a theory of recovery not forbidden by *Albright*; and that all of his claims under the First, Sixth, Eighth, and Fourteenth Amendments were dismissed at the urging of the defendants who did not object to the jury charge, and thus they cannot complain that the trial itself reintroduced Castellano's due process claims, claims that were properly before the jury. As we will explain, we agree that the trial court's instructions were erroneous, although in conformity with existing law of the circuit. Contrary to defendants' contentions, the error was in not allowing the jury to consider fully the claim of wrongful conviction by extruding it through the Fourth Amendment.

II

1

We have been inexact in explaining the elements of a claim for malicious prosecution brought under the congressional grant of the right of suit under 42 U.S.C. § 1983. We are not alone. Other circuits have been facing similar difficulties and share with us a common shortcoming -- either not demanding that this genre of claims identify specific constitutional deprivations or struggling in their efforts to do so. This laxness has tolerated claims in which specific constitutional violations are often embedded, but float unspecified, undefined, and hence unconfined inside a general claim of malicious prosecution. Its characteristic weak discipline has permitted the blending of state tort and constitutional principles, inattentive to whether the court is adopting state law as federal law in a process of federal common law decision-making, such as detailing remedial responses to a constitutional deprivation, or whether the court is creating a freestanding constitutional right to be free of malicious prosecution. On examination, the latter appears to rest on a perception that the sum of elements borrowed from state tort law by some synergism is a constitutional right itself -- in its best light, that the elements of the state law tort of malicious prosecution, when proved, inevitably entail constitutional deprivation. While sometimes this is so, it is not inevitable, and the price of cutting the tether from constitutional text is too great to permit it to continue.

We are persuaded that we must return to basics. And in doing so we conclude that no such freestanding constitutional right to be free from malicious prosecution exists. This conclusion in turn means that we must insist on clarity in the identity of the constitutional violations asserted. In this effort,

we first look at the state law tort of malicious prosecution and then look to the enforcement of constitutional protections enjoyed by persons accused of crimes, all as informed by the decision of the Supreme Court in *Albright v. Oliver*.[5]

2

Despite frequent use of the term "malicious prosecution" to describe a wide range of events attending a filing of criminal charges and even continuing through trials, the tort of malicious prosecution has a relatively narrow and widely accepted definition.

The tort of malicious prosecution of criminal proceedings occurs when one citizen initiates or procures the initiation of criminal proceedings against an innocent person, for an improper purpose and without probable cause therefor, if the proceedings terminate favorably for the person thus prosecuted.[6]

It signifies that initiation of charges without probable cause lies at the heart of this definition, one that is deployed by state courts throughout the country, including Texas.[7]

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[5] 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994).

[6] FOWLER V. HARPER ET AL., THE LAW OF TORTS § 4.1 (3d ed. 1996).

[7] *See Richey v. Brookshire Grocery Co.*, 952 S.W.2d 515, 517-18, 40 Tex. Sup. Ct. J. 839 (Tex. 1997).

In *Shaw v. Garrison*, we recognized a "federal right to be free from bad faith prosecutions" without elaborating on the source of that right.[8] Twelve years later we held in *Wheeler v. Cosden Oil & Chemical Co.* that "the Fourteenth Amendment imposes a duty on state prosecutors to charge only upon ascertaining probable cause."[9] Judge Gee's opinion, thoughtful as it was, proved to be a wrong turn -- one quickly flagged but which nonetheless stood until *Albright*, ten years later. *Wheeler's* requirement of probable cause to initiate gave common footing to a right secured by the Fourteenth Amendment to be free of charges initiated without probable cause and the identical duty imposed by the classic common law tort of malicious prosecution. The ability of the *Wheeler* holding to survive Supreme Court scrutiny was questioned in *Brummett v. Camble* because it was based on an implied right rather than a "more textual footing."[10] But the *Brummett* opinion ventured that a malicious prosecution claim based on the infringement of a specific constitutional guarantee would survive review.[11] Other pre-*Albright* cases recognized that claims of false arrest, false imprisonment, and malicious prosecution could implicate Fourteenth and Fourth Amendment rights "when the individual complains of an

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[8] 467 F.2d 113, 120 (5th Cir. 1972).

[9] 734 F.2d 254, 260 (5th Cir. 1984).

[10] 946 F.2d 1178, 1181 n.2 (5th Cir. 1991).

[11] *Id.*

arrest, detention, and prosecution without probable cause."[12] None of this court's pre-*Albright* decisions achieved a fit between a claim of malicious prosecution and claims under the Constitution, including the Fourth Amendment. The Supreme Court in *Albright v. Oliver*[13] defined a starting point.

4

Albright alleged that Officer Oliver instituted a baseless charge against him and gave misleading testimony at a preliminary hearing.[14] The state court found probable cause to try Albright, but the charges were dismissed prior to trial.[15] Albright sued under § 1983 claiming the officer "deprived him of substantive due process under the Fourteenth Amendment - his 'liberty interest' -- to be free from criminal prosecution except upon probable cause."[16]

Chief Justice Rehnquist's plurality opinion, joined by Justices O'Connor, Scalia, and Ginsberg, held that "it is the Fourth Amendment, and not substantive due process" under which Albright's claim must be judged.[17] The plurality reasoned that the Fourth Amendment addresses concerns of

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[12] *Thomas v. Kippermann*, 846 F.2d 1009, 1011 (5th Cir. 1988); *see also Sanders v. English*, 950 F.2d 1152, 1159 (5th Cir. 1992) (same).

[13] 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994).

[14] *Id.* at 269.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 271.

pretrial deprivations of liberty, and "where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'"[18] Noting that Albright's claim was not for a violation of procedural due process or a violation of Fourth Amendment rights, the Court dismissed it and expressed no view on whether his claim would succeed under the Fourth Amendment.[19]

Justices Souter and Scalia each wrote separately to emphasize differences with the plurality, but each agreed that there was no need to look beyond the Fourth Amendment in Albright's case.[20] Justice Ginsburg's separate opinion explained that the Fourth Amendment prohibition on unreasonable seizures could extend to post-arraignment travel restrictions such as those placed on Albright, and thus a Fourth Amendment claim would not accrue until the charges against Albright were dismissed.[21]

Justice Kennedy, joined by Justice Thomas, agreed that the Fourth Amendment applied to claims of unreasonable seizures, but felt that Albright's claim was for the instigation

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[18] *Id.* at 273 (*quoting Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)).

[19] *Id.* at 271, 275

[20] *Id.* at 286-89 (Souter, J., concurring); *id.* at 275-76 (Scalia, J., concurring).

[21] *Id.* at 277-81 (Ginsburg, J., concurring).

of the prosecution, not any resulting seizure.[22] He stated that while "due process requirements for criminal proceedings do not include a standard for the initiation of a criminal prosecution," the "Due Process Clause protects interests other than the interest in freedom from physical restraint."[23] Assuming *arguendo* that some of these interests protected by the Due Process Clause include those protected by the common law of torts (such as freedom from malicious prosecution), Kennedy stated that "our precedents make clear that a state actor's random and unauthorized deprivation of that interest cannot be challenged under [§ 1983] so long as the State provides an adequate postdeprivation remedy."[24] Kennedy concluded that because the state provides a cause of action for malicious prosecution, a § 1983 claim is barred under the holding of *Parratt*.[25] Where a state did not provide a tort remedy for malicious prosecution "there would be force to the argument that the malicious initiation of a baseless criminal prosecution infringes an interest protected by the Due Process Clause and enforceable under § 1983."[26]

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[22] *Id.* at 281 (Kennedy, J., concurring).

[23] *Id.* at 283.

[24] *Id.* at 284 (*citing Parratt v. Taylor*, 451 U.S. 527, 535-544, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981)).

[25] *Id.* at 285-86. Justice Stevens took issue with this interpretation of *Parratt* in his dissent, arguing that *Parratt* only applies to those torts which any person could commit, and "its rationale does not apply to officially authorized deprivations of liberty or property." *Id.* at 313 (Stevens, J., dissenting).

[26] *Id.* at 286 (Kennedy, J., concurring).

A series of our post-*Albright* decisions evolved into the rule articulated in *Gordy v. Burns*,[27] the decision the panel majority found to be controlling.[28] *Gordy* holds that "the rule in this circuit is that the elements of the state-law tort of malicious prosecution and the elements of the constitutional tort of 'Fourth Amendment malicious prosecution' are coextensive."[29] Furthermore, "a plaintiff in a § 1983 malicious prosecution action need establish only the elements of common-law malicious prosecution. . . . Courts must look to the elements of a malicious prosecution claim under the law of the state where the offense was committed."[30]

This holding is the result of persisting uncertainties in precedent accumulating over time. Judge Barksdale's dissent from the panel majority observes that the post-*Albright* cases failed to distinguish our prior precedent which relied on the Fourteenth Amendment, a position his dissent urges *Albright* called into question.[31] We add that many of the recent cases fail to note the qualifying language of earlier decisions, which state that malicious prosecution claims implicate the Fourth

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[27] 294 F.3d 722 (5th Cir. 2002).

[28] *Castellano v. Fragozo*, 311 F.3d 689, 698-99 (5th Cir. 2002).

[29] *Gordy*, 294 F.3d at 725 (*citing Piazza v. Mayne*, 217 F.3d 239, 245 (5th Cir. 2000)).

[30] *Id.* at 726.

[31] *See Castellano*, 311 F.3d at 722-24 (Barksdale, J., dissenting).

and Fourteenth Amendments "'when the individual complains of an arrest, detention, and prosecution without probable cause.'"[32] As we will explain, *Albright* did not speak to the Fourteenth Amendment beyond eschewing reliance upon substantive due process to create a requirement of probable cause to initiate a prosecution, albeit a holding that drained *Wheeler* of precedential force.

To look forward, we first look back to find the trace to *Gordy* that will inform our effort to chart a new path. *Gordy* relied on *Piazza*,[33] acknowledging that we assumed without deciding that satisfying the Texas state law elements was sufficient.[34] Similarly, *Gordy* relied on *Evans*,[35] which in turn cites *Brummett* for the holding that "malicious prosecution may be a constitutional violation, but only if all of its common law elements are established."[36] Yet *Brummett* made clear that "the federal courts have repeatedly held that common law and state tort law do not define the scope of liability under

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[32] *Id.* at 722 (*quoting Sanders v. English*, 950 F.2d 1152, 1159 (5th Cir. 1992)).

[33] *See Gordy*, 294 F.3d at 725.

[34] *See Piazza v. Mayne*, 217 F.3d 239, 245 (5th Cir. 2000) ("Piazza asserts on appeal (and Mayne does not dispute) that the requirements of the state law tort and the constitutional tort are the same. Thus, we assume without deciding that the requirements are coextensive in the context of a § 1983 action.").

[35] *See Gordy*, 294 F.3d at 725.

[36] *Evans v. Ball*, 168 F.3d 856, 863 n.9 (5th Cir. 1999) (*citing Brummett v. Camble*, 946 F.2d 1178, 1183 (5th Cir. 1991)).

§ 1983."[37] The court in *Brummett* did look to the common law elements of malicious prosecution, and out of concern that plaintiffs would relitigate state convictions in federal court, adopted the common law element that the plaintiff show proof of favorable termination of the prosecution.[38] Similar concerns led the Supreme Court to adopt an analogous element as well.[39] *Brummett* did not, however, hold that all common law tort elements were required for a federal claim.

Finally, *Gordy* relied on *Kerr*.[40] *Kerr* states without explanation that the elements for a § 1983 claim of malicious prosecution are those of Texas state law, *citing Hayter v. City of Mount Vernon*.[41] *Hayter* cites *Taylor v. Gregg*,[42] which

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[37] *Brummett*, 946 F.2d at 1183.

[38] *Id.* at 1183-84.

[39] *See Heck v. Humphrey*, 512 U.S. 477, 484-87, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994) (holding that "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus").

[40] *See Gordy*, 294 F.3d at 725 *(citing Kerr v.* Lyford, 171 F.3d 330 (5th Cir. 1999)).

[41] *Kerr*, 171 F.3d at 340 (*citing Hayter*, 154 F.3d 269, 275 (5th Cir. 1998)).

[42] *See Hayter*, 154 F.3d at 275 (*citing Taylor*, 36 F.3d 453, 455 (5th Cir. 1994)).

relies in turn on *Brown v. United States*.[43] As the *Gordy* opinion notes, *Brown* was a Federal Tort Claims Act case, and the FTCA requires the court to look to the law of the place where the alleged tort occurred.[44] In none of the opinions that ultimately rely on *Brown* did we explain why the requirements of the FTCA should dictate the elements of a § 1983 claim.

With hindsight, our precedent governing § 1983 malicious prosecution claims is a mix of misstatements and omissions which leads to the inconsistencies and difficulties astutely pointed to in Judge Barksdale's dissent from the panel opinion and Judge Jones's special concurrence in *Kerr*.[45] We are not alone in this drift. Other circuits have traveled uneven paths as well, and numerous approaches have developed after *Albright*.

6

Our sister circuits take two broad approaches to malicious prosecution claims under § 1983. The first is to require proof of all common law elements of malicious prosecution, usually based on the law of the state where the offense occurred, as well as proof of a constitutional violation -- an approach adopted in various forms by the First, Second, Third, Ninth,

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[43] *Taylor*, 36 F.3d at 455 (*citing Brown*, 653 F.2d 196, 198 (5th Cir. 1981)).

[44] *See Gordy*, 294 F.3d at 726 n.3.

[45] *See Kerr*, 171 F.3d at 342-43 (Jones, J., specially concurring).

and Tenth Circuits.[46] The second approach views malicious prosecution as unenforceable under § 1983, looking to the common law elements of the tort only as needed to assist the enforcement of analogous constitutional violations -- seizures under the Fourth Amendment, for example. This is the view of the Fourth, Seventh, and Eleventh Circuits.[47] The approach of the Sixth Circuit is not clear, as it also has conflicting precedents and has yet to articulate the elements of a § 1983 malicious prosecution claim.[48] Similarly, the Eighth Circuit's approach is undefined beyond insisting upon a constitutional violation.[49]

In *Nieves v. McSweeney*, the First Circuit cited four state common law elements it requires for a malicious prosecution claim.[50] But the court then stated that the plaintiff "must

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[46] *See infra* notes 50-67 and accompanying text.

[47] *See infra* notes 68-81 and accompanying text.

[48] *See Thacker v. City of Columbus*, 328 F.3d 244, 258-59 (6th Cir. 2003) (noting that contrary to binding circuit precedent, some panels do not recognize a § 1983 malicious prosecution claim, and stating that the circuit has yet to define the elements of a federal malicious prosecution claim).

[49] *See Pace v. City of Des Moines*, 201 F.3d 1050, 1055 (8th Cir. 2000) ("It is well established in this circuit that an action for malicious prosecution by itself is not punishable under § 1983 because it does not allege a constitutional injury." (internal quotations and citations omitted)).

[50] 241 F.3d 46, 53 (1st Cir. 2001) (listing (1) the commencement or continuation of a criminal proceeding against the eventual plaintiff at the behest of the eventual defendant; (2) the

show a deprivation of a federally-protected right."[51] The court reasoned that procedural due process cannot be the basis of the claim because Massachusetts provides an adequate remedy, and *Albright* forecloses substantive due process claims.[52] The court "assumed without deciding that [a state law] malicious prosecution can, under some circumstances, embody a violation of the Fourth Amendment and thus ground a cause of action under section 1983."[53] Turning to the case at bar, the court acknowledged that while malicious prosecution permits damages for deprivations of liberty pursuant to legal process, the plaintiffs had been arrested without a warrant. Therefore, the plaintiffs failed to allege a seizure which could be part of their malicious prosecution since a warrantless arrest is not pursuant to legal process.[54] The plaintiffs' post-arraignment restrictions and harms (release on their own recognizance, pending serious criminal charges, sullied reputations, pretrial court appearances, and trial) were not seizures.[55]

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termination of the proceeding in favor of the accused; (3) an absence of probable cause for the charges; and (4) actual malice).

[51] *Id.*

[52] *Id.*

[53] *Id.* at 54; *see Britton v. Maloney*, 196 F.3d 24, 28 (1st Cir. 1999) ("We will simply assume, for the purposes of the analysis, that the type of conduct which constitutes a malicious prosecution under state law can sometimes constitute a violation of the Fourth Amendment as well.").

[54] *Nieves*, 241 F.3d at 54.

[55] *Id.* at 54-55.

The Second Circuit also requires proof of a tort under state common law and an injury caused by a deprivation of liberty guaranteed by the Fourth Amendment.[56] That court has noted that it is "theoretically possible" for a plaintiff to premise a malicious prosecution claim on some other constitutional right, in which case the standard governing that right would determine whether there was a constitutional violation.[57] Like the First Circuit, the Second requires a seizure pursuant to legal process, ruling out warrantless arrests.[58] However, the Second Circuit has found that post-arraignment travel restrictions are sufficient to constitute a seizure.[59]

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[56] *Singer v. Fulton County Sheriff*, 63 F.3d 110, 116 (2d Cir. 1995) (stating that "the court must engage in two inquiries: whether the defendant's conduct was tortious; and whether the plaintiff's injuries were caused by the deprivation of liberty guaranteed by the Fourth Amendment"); *see also Murphy v. Lynn*, 118 F.3d 938, 944 (2d Cir. 1997) (*quoting Singer*, 63 F.3d at 116, for the holding that a § 1983 "plaintiff must show conduct that was tortious under state law and that injury was 'caused by the deprivation of liberty guaranteed by the Fourth Amendment'").

[57] *Singer*, 63 F.3d at 116 n.5.

[58] *Id.* at 116-17.

[59] *Murphy*, 118 F.3d at 946 ("While a state has the undoubted authority ... to restrict a properly accused citizen's constitutional right to travel outside of the state as a condition of his pretrial release, and may order him to make periodic court appearances, such conditions are appropriately viewed as seizures within the meaning of the Fourth Amendment.").

The Third Circuit likewise requires proof of all common law elements, as well as a constitutional violation,[60] but not with certainty. Rather, it has questioned the role of additional common law elements of malicious prosecution: "For instance, if the harm alleged is a seizure lacking probable cause, it is unclear why a plaintiff would have to show that the police acted with malice."[61] However, it has not abandoned this requirement. Like the Second Circuit, post-arraignment restrictions ($10,000 bond, travel restrictions, weekly contact with pretrial services, and attendance at all pretrial hearings) constitute a seizure.[62] Unlike most circuits, the alleged constitutional violation is not limited to a Fourth Amendment seizure, and includes any constitutional violation, including violations of procedural due process (but not substantive due process),[63] a distinction that will draw our attention in this case.

The Tenth Circuit is more restrictive, requiring proof of all common law elements, but limiting the additional constitutional violation to a violation of "the Fourth

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[60] *See Donahue v. Gavin*, 280 F.3d 371, 380 n.16 (3d Cir. 2002) (stating that it had remanded a previous § 1983 case because "the district court did not rule on whether [the plaintiff] had satisfied the common law elements of a malicious prosecution claim").

[61] *Gallo v. City of Philadelphia*, 161 F.3d 217, 222 n.6 (3d Cir. 1998).

[62] *Id.* at 222.

[63] *See Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 792 (3d Cir. 2000) (*citing Torres v. McLaughlin*, 163 F.3d 169 (3d Cir. 1998)).

Amendment's right to be free from unreasonable seizures."[64] The court noted that where an independent and untainted determination of probable cause is made at the arraignment, the post-arraignment detention is not a seizure even if the arrest was illegal.[65]

In the Ninth Circuit the state tort of malicious prosecution alone is not sufficient for a § 1983 claim if there is a state remedy available, but there is an exception if the defendant had the intent "to deprive a person of equal protection of the law or otherwise to subject a person to a denial of constitutional rights."[66] The plaintiff must satisfy the state law elements and the element of purpose to deprive a constitutional right.[67]

Adopting the second of the two broad approaches, the Fourth Circuit in *Lambert v. Williams* held:

> There is no such thing as a "§ 1983 malicious prosecution" claim. What we termed a "malicious prosecution" claim . . . is simply a claim founded on a Fourth Amendment seizure that incorporates

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[64] *Taylor v. Meacham*, 82 F.3d 1556, 1561 (10th Cir. 1996) (stating that "our circuit takes the common law elements of malicious prosecution as the 'starting point' ... but always reaches the ultimate question ... whether the plaintiff has proven a constitutional violation").

[65] *Id.* at 1563-64.

[66] *Poppell v. City of San Diego*, 149 F.3d 951, 961 (9th Cir. 1998) (*citing Usher v. City of Los Angeles*, 828 F.2d 556, 562 (9th Cir. 1987)).

[67] *Id.* at 962-63.

> elements of the analogous common law tort of malicious prosecution--specifically, the requirement that the prior proceeding terminate favorably to the plaintiff. It is not an independent cause of action.[68]

Interestingly, the Fourth Circuit cites cases from the First, Second, and Tenth Circuits as taking the same approach it adopted,[69] pointing to the subtlety of the difference between the two approaches. The difference, nonetheless central, is that when the constitutional violation is the focus, only those common law elements which are consistent with enforcement of a constitutional right are incorporated, and those that are not are rejected.

For instance, the Fourth Circuit has rejected the common law malice requirement, "since the reasonableness of a seizure under Fourth Amendment jurisprudence should be analyzed from an objective perspective."[70] On the other hand, that court has incorporated the requirement of a favorable termination, not only as a prerequisite to recovery, but also to establish the time of accrual.[71] The court stated that

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[68] 223 F.3d 257, 262 (4th Cir. 2000) (internal citations omitted).

[69] *Id.* at 261 (*citing Britton v. Maloney*, 196 F.3d 24, 28-29 (1st Cir. 1999); *Murphy v. Lynn*, 118 F.3d 938, 946 (2d Cir. 1997); *Taylor v. Meacham*, 82 F.3d 1556, 1561 (10th Cir. 1996)).

[70] *Id.* at 262 n.2 (internal quotations marks omitted).

[71] *Id.* at 262 n.3. As mentioned, this court took a similar approach by adopting only this element in *Brummett v. Camble*, 946 F.2d 1178, 1183 (5th Cir. 1991), as did the Supreme Court in *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994).

incorporating common law elements was not done to create a new cause of action, but rather was "in recognition of the fact that § 1983 was designed to create a 'special species of tort liability.'"[72] It pointed to several Supreme Court cases where common law elements were incorporated into § 1983 claims.[73]

The Seventh Circuit, like the Fourth, does not recognize a federal claim of malicious prosecution: "If a plaintiff can establish a violation of the fourth (or any other) amendment there is nothing but confusion to be gained by calling the legal theory 'malicious prosecution.'"[74] Instead, "claims of malicious prosecution should be analyzed ... under the language of the Constitution itself and, if state law withholds a remedy, under the approach of *Parratt*," whereby the adequacy of a state law remedy bars a due process claim.[75]

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[72] *Lambert*, 223 F.3d at 262 (*quoting Imbler v. Pachtman*, 424 U.S. 409, 417, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976)).

[73] *Id.* (*citing Heck*, 512 U.S. at 483-84 (finding a legality of confinement claim analogous to the malicious prosecution tort, and incorporating into the federal claim the common law prerequisite of termination of the prior criminal proceeding in favor of the accused); *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 305-06, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986) (incorporating common law damages principles into a § 1983 claim and finding that the abstract "value" of constitutional rights cannot form the basis of compensatory relief); *Carey v. Piphus*, 435 U.S. 247, 253-67, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978) (structuring compensatory damages principles under § 1983 by reference to common law); *Imbler*, 424 U.S. at 422-29 (incorporating the common law principle of prosecutorial immunity)).

[74] *Newsome v. McCabe*, 256 F.3d 747, 751 (7th Cir. 2001).

[75] *Id.*

The Seventh Circuit explicitly rejected its earlier holdings which required the state law elements of the tort to be satisfied, stating that "whatever scope malicious prosecution may have as a constitutional tort after *Albright*, it does not depend on state law in this way."[76] It had no occasion to consider which common law tort elements of malicious prosecution it would incorporate. Finally, it recognized that Newsome had stated a due process claim "if the prosecutors withheld material exculpatory details."[77]

The Eleventh Circuit takes an approach quite similar to that of the Fourth Circuit. In *Whiting v. Traylor*, the court stated that labeling a § 1983 claim as a malicious prosecution claim

> can be a shorthand way of describing a kind of legitimate section 1983 claim: the kind of claim where the plaintiff, as part of the commencement of a criminal proceeding, has been unlawfully and forcibly restrained in violation of the Fourth Amendment and injuries, due to that seizure, follow as the prosecution goes ahead.[78]

The court then concluded that "in determining when a section 1983 claim accrues (as well as the elements which must be pled to state a claim) we must seek help from the common law tort which is most analogous to the claim in the case before

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[76] *Id.* at 750.

[77] *Id.* at 752 (*citing Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)).

[78] 85 F.3d 581, 584 (11th Cir. 1996).

us."[79] In situations where the alleged seizure was pursuant to legal process the tort of malicious prosecution is most analogous, and so the court incorporated the favorable termination element whereby the claim does not accrue until the prosecution ends in the plaintiff's favor.[80] In addition, the court noted that under analogous malicious prosecution principles, injuries caused by the unlawful seizure may include those associated with the prosecution.[81]

III

We now turn to *Albright*, which, as important as it is, held far less than is now being claimed. First, we remind that the charges in *Albright* were dismissed after petitioner's arrest and release on bail. There was no further prosecution. Chief Justice Rehnquist, in his opinion for the Court, precisely stated the claim presented:

> Petitioner's claim before this Court is a very limited one. He claims that the action of respondents infringed his substantive due process right to be free of prosecution without probable cause. He does not claim that Illinois denied him the procedural due process

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[79] *Id.* at 585 (*citing Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994)).

[80] *Id.*; *see also Wood v. Kesler*, 323 F.3d 872, 881-82 (11th Cir. 2003) (discussing incorporation of both state and federal common law tort elements).

[81] *Id.* at 586 & n.10 (noting that there may be causation problems if an independent prosecutor's actions broke the causal link between the defendant officer's behavior and the plaintiff's injury).

> guaranteed by the Fourteenth Amendment. Nor does he claim a violation of his Fourth Amendment rights, notwithstanding the fact that his surrender to the State's show of authority constituted a seizure for purposes of the Fourth Amendment.[82]

The Court was also precise in what it was holding:

> Where a particular Amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."[83]

Albright rejected the contention that the initiation of criminal proceedings without probable cause is a violation of substantive due process, holding that petitioner must look to the explicit text of the Fourth Amendment as a source of protection for the "particular sort of government behavior" at issue. To the point, causing charges to be filed without probable cause will not without more violate the Constitution. So defined, the assertion of malicious prosecution states no constitutional claim. It is equally apparent that additional government acts that may attend the initiation of a criminal charge could give rise to claims of constitutional deprivation.

The initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional

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[82] *Albright v. Oliver*, 510 U.S. 266, 271, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994).

[83] *Id.* at 273 (*quoting Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)).

protection -- the Fourth Amendment if the accused is seized and arrested, for example, or other constitutionally secured rights if a case is further pursued. Such claims of lost constitutional rights are for violation of rights locatable in constitutional text, and some such claims may be made under 42 U.S.C. § 1983. Regardless, they are not claims for malicious prosecution and labeling them as such only invites confusion.

IV

1

One matter should here be put to rest. Under the unique circumstances of this case, we apply an abuse of discretion standard, rather than plain error.[84] We ask "whether the court's charge, as a whole, is a correct statement of the law and whether it clearly instructs jurors as to the principles of the law applicable to the factual issues confronting them."[85] It is true that defendants did not object to the jury charge beyond urging their earlier motions for judgment as a matter of law.[86] It is equally true that defendants did object to

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[84] *United States v. Daniels*, 281 F.3d 168, 183 (5th Cir. 2002).

[85] *Id.* (internal quotations and citations omitted).

[86] We iterate our longstanding view that failure to object to a jury charge ordinarily limits review to plain error. *See, e.g.*, *Tompkins v. Cyr*, 202 F.3d 770, 783 (5th Cir. 2000); *Highland Ins. Co. v. Nat'l Union Fire Ins. Co.*, 27 F.3d 1027, 1032 (5th Cir. 1994); *Farrar v. Cain*, 756 F.2d 1148, 1150 (5th Cir. 1985). Rule 51 states that "no party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter

allowing the jury to consider wrongful conviction as a claim under the Fourth or Fourteenth Amendment, making their legal position clear to the magistrate judge both by their motions for judgment as a matter of law, as well as by explicit renewal of those motions at the charge conference in response to the judge's invitation to lodge any objections to the proposed charge. Moreover, defendants appeal from the district court's denial of judgment as a matter of law, and its rejection of the contention that the Fourth Amendment would not support claims arising from the trial.

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The magistrate judge in this case, facing the daunting task of attempting to locate a regression line in our decisions, dismissed all claims except claims for violation of the Fourth Amendment. In doing so he read *Albright* broadly in concluding that the Fourth Amendment afforded an adequate constitutional predicate for all of the defendants' conduct through trial -- or none of it.

In the effort to rest the entire trial upon the Fourth Amendment, the trial judge instructed the jury that to prove he was maliciously prosecuted, Castellano must establish by a preponderance of the evidence each of the following:

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objected to and the grounds of the objection." "The purpose of this rule is to allow the trial court to correct any error before the jury begins its deliberation." *Farrar*, 756 F.2d at 1150. Nevertheless, given the unusual procedural history of this case, that the jury was charged contrary to the law of the case, and the fact that the nature of the defendants' continued objections to submitting the case to the jury went to the heart of this error, an abuse of discretion standard is appropriate.

> One, the defendants caused or commenced or aided a criminal proceeding against him; two, the defendants acted without probable cause; three, the criminal action terminated in his favor; four, he was innocent of arson; five, the defendants acted with malice by prosecuting him for arson; and six, he was damaged by the criminal proceeding.

The trial court further cabined the claims by instructing that:

> A person's failure to fully and fairly disclose all material information and knowingly providing false information to the prosecutor are relevant to the malice and causation elements of a malicious prosecution claim but have no bearing on probable cause.

This instruction is a direct quotation from a decision of the Texas Supreme Court stating the elements of a claim of malicious prosecution under state law.[87] It is a vivid example of the hazards of blending state tort law with federal law in an undifferentiated way. The Fourth Amendment of the United States Constitution cannot be circumscribed by state tort law, yet this is the practical effect of this instruction, in that if Fragozo were acting under color of state law in providing the false information, there would be no probable cause. It neatly excised Castellano's claim that the falsity of the tapes and testimony furnished by Sanchez and Fragozo was attributed to the prosecutors because Fragozo acted under color of state law and hence denied Castellano due process, just as the Texas Court of Criminal Appeals had concluded in vacating

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[87] *See Richey v. Brookshire Grocery Co.*, 952 S.W.2d 515, 519, 40 Tex. Sup. Ct. J. 839 (Tex. 1997).

his conviction.[88] Locating the state elements of malicious prosecution under the Fourth Amendment did not remove the trial events from the case; at the same time, it fell short of putting the Fourteenth Amendment back in because it limited the jury's use of evidence of fabricated evidence and perjured testimony to its resolution of the issues of malice and causation. The instruction also assumed that initiating a criminal case without probable cause denies a constitutional right, contrary to *Albright*, and that defendants' testimony at trial could supply the causal nexus between the Fourth Amendment and the claim of wrongful conviction.

As we will explain by the markers of the new path we define today, this reading of the Fourth and Fourteenth Amendments was deeply flawed. It swept too wide in two directions: simultaneously holding that *Albright* closed the door to any claim of a deprivation of due process and that the protections of the Fourth Amendment extended to events at trial.

The manufacturing of evidence and the state's use of that evidence along with perjured testimony to obtain Castellano's wrongful conviction indisputably denied him rights secured by the Due Process Clause. They were not properly dismissed on

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[88] *Ex parte Castellano*, 863 S.W.2d 476, 485 (Tex. Crim. App. 1993) ("Fragozo acted under color of law and was, therefore, a member of the prosecution team in the investigation of the instant case and as such his knowledge of the perjured testimony was imputable to the prosecution."). Castellano went to trial on his Third Amended Complaint. There he continued his allegations that Ed Sargologos, the district attorney who prosecuted the case and who was earlier dismissed from the case on immunity grounds, knowingly used the manufactured and perjured testimony and withheld that fact from the defendant.

the basis that no claim was stated, or upon the confusing assertion that the Fourteenth Amendment will not support a claim for "malicious prosecution," another example of the uncertainty accompanying the use of the term malicious prosecution without lifting up the constitutional claims. Defendants pressed the absolute immunity of witnesses in their motions for summary judgment, but the magistrate judge did not reach the contention, electing to accept the erroneous contention that under *Albright* there could be no denial of due process if there was an adequate state tort remedy. At the same time, the magistrate judge determinedly applied holdings of this court that malicious prosecution had the same elements whether the claim was asserted under state tort law or § 1983. To assist in our explanation, we will unpack the ruling of the magistrate judge, turning first to the dismissal of all claims under the Fourteenth Amendment.

3

We cannot agree that the claims under the Fourteenth Amendment were properly dismissed because there was no deprivation of due process that can support a claim for damages under 42 U.S.C. § 1983. This view rests on two arguments. First, that the specific constitutional rights guiding a criminal trial spend their force in assuring a fair trial, and, in its most primitive form, that they cannot support an action under 42 U.S.C. § 1983. Second, that a state remedy in tort to compensate for the injury is an adequate post-deprivation response and hence there was no denial by the state of the process secured by the Fourteenth Amendment.[89]

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[89] *See, e.g., Nieves v. McSweeney*, 241 F.3d 46, 53 (1st Cir. 2001).

Turning first to the very role of § 1983 in enforcing constitutional rights, the Supreme Court has made clear that Congress created a species of tort liability with § 1983.[90] As the court observed in *Cary v. Piphus*:

> Over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisite for their recovery, provide the appropriate starting point for the inquiry under § 1983 as well.[91]

The substantial body of law developing the immunity to liability of various players in criminal trials rests on the implicit acceptance of the draw of § 1983 upon principles of tort law to compensate for injury suffered in the loss of constitutional rights.[92] We find no reasoned basis for concluding that § 1983 is never available to remedy injuries wrought by a denial of due process. The countervailing interests of law enforcement have been weighed in the judicial development of the immunity doctrine, not in somehow sidestepping the congressional command of § 1983.

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[90] *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 305, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986).

[91] 435 U.S. 247, 257-58, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978).

[92] *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976).

Nor is there a serious suggestion that the *Parratt* doctrine is applicable to Castellano's claim that the manufacturing of evidence and use of perjured testimony at trial leading to his wrongful conviction denied him due process.[93] *Albright*, in forbidding the deployment of substantive due process to police state actors' conduct that was governed directly by particular constitutional provisions, makes no such suggestion.

In his concurring opinion in *Albright*, Justice Kennedy, joined by Justice Thomas, made clear that in his view Albright's due process claim concerned only the "malicious initiation of a baseless criminal prosecution," rather than an unlawful arrest or events at trial leading to a wrongful conviction, since there was no trial.[94] He noted that the Due Process Clause protects interests "other than the interest in freedom from physical restraint," and assumed *arguendo* that "some of the interests granted historical protection by the common law of torts (such as the interests in freedom from defamation and malicious prosecution) are protected by the Due Process Clause."[95] However, he also noted that even if malicious initiation of charges was protected by the Due Process Clause, such a claim would be barred: "Our precedents make clear that a state actor's random and unauthorized deprivation of that interest cannot be challenged

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[93] Before trial defendants even urged that Fourth Amendment claims should be dismissed because there was an adequate state remedy.

[94] *Albright v. Oliver*, 510 U.S. 266, 281, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994) (Kennedy, J., concurring).

[95] *Id.* at 283-84.

under 42 U.S.C. § 1983 so long as the State provides an adequate postdeprivation remedy."[96]

That no other justices joined this writing aside, Justice Kennedy's opinion carefully distinguished the claim in *Albright* of malicious initiation of charges from those cases where the Court found that a criminal rule or procedure violated the fundamental principles of due process. He stated that Albright's claim thus

> differs in kind from *In re Winship*, and the other criminal cases where we have recognized due process requirements not specified in the Bill of Rights. The constitutional requirements we enforced in those cases ensured fundamental fairness in the determination of guilt at trial. *See, e.g., Mooney v. Holohan*, 294 U.S. 103, 112, 55 S. Ct. 340, 341, 79 L. Ed. 791 (1935) (due process prohibits "deliberate deception of court and jury" by prosecution's knowing use of perjured testimony).[97]

This qualification makes sense. Unquestionably, the *Parratt* principle is important in the effort to find principled limits to § 1983's reach into the tort fountain. At the same time, the court has recognized that its medicine can be too strong. Justice Kennedy explained its contraindications, observing that

> courts, including our own, have been cautious in invoking the rule of *Parratt*. That hesitancy is in part

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[96] *Id.* at 284.

[97] *Id.* at 283 (some citations omitted).

> a recognition of the important role federal courts have assumed in elaborating vital constitutional guarantees against arbitrary or oppressive state action. We want to leave an avenue open for recourse where we think the federal power ought to be vindicated,[98]

a reservation also expressed in *Monroe v. Pape*'s reading of § 1983 as supplementary to state remedies for constitutional injury.[99] This caution also finds expression in Justice Kennedy's statement that a claim of malicious initiation of criminal proceedings "differs in kind" from claims that implicate "fundamental fairness in the determination of guilt at trial"[100] -- claims in which the federal power ought to be vindicated. The concurring opinion of Justice Kennedy, joined by Justice Thomas, expresses the view that *Parratt* can brake the spinning of new constitutional strictures upon the trial of criminal cases from a blend of state tort law and substantive due process, a principle running through *Albright*.

At their most fundamental level, the values sought to be vindicated here are core commands of our United States Constitution -- undiluted and unblurred by any blend of state tort law that would either enhance or diminish its force. Unlike defamation and malicious prosecution, this constitutionally secured right of an accused in a criminal case was not seeded in the common law of tort where duties are the product of judicial choice with no roots in the value choices of our organic law.

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[98] *Id.* at 284-85 (citations omitted).

[99] 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).

[100] *Albright*, 510 U.S. at 283.

We need not agree with the Seventh Circuit's statement that Justice Kennedy's concurring opinion is the holding of *Albright*[101] to agree that there are fundamental rights, albeit few in number, secured by due process that differ in kind from those at issue in *Albright* and which are beyond the reach of *Parratt*. Justice Stevens made the point as well, observing, "even if prescribed procedures are followed meticulously, a criminal prosecution based on perjured testimony ... simply does not comport with the requirements of the Due Process Clause."[102] This is no more than the line drawn by the *Parratt* line of cases and the handful of cases decrying conduct so destructive of a fair trial that it cannot be justified by procedures.[103] As Chief Justice Rehnquist put it in *Daniels*, the Due Process Clause protects against arbitrary acts of government by promoting fairness in procedure and "by barring certain government actions regardless of the fairness of the procedures used to implement them."[104]

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As we have indicated, we find the reasoning employed in dismissing Castellano's due process claims flawed. Castellano's contention that the manufacturing of evidence

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[101] *See Newsome v. McCabe*, 256 F.3d 747, 751 (7th Cir. 2001).

[102] *Albright*, 510 U.S. at 300 (Stevens, J., dissenting).

[103] *Zinermon v. Burch*, 494 U.S. 113, 125-26, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990); *Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986); *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981).

[104] *Daniels*, 474 U.S. at 331.

and knowing use of perjured testimony attributable to the state is a violation of due process is correct.[105] Nevertheless, on remand Castellano will face the well-established rule that prosecutors and witnesses, including police officers, have absolute immunity for their testimony at trial.[106] Courts have also held that non-testimonial pretrial actions, such as the fabrication of evidence, are not within the scope of absolute immunity because they are not part of the trial.[107] Thus, while Castellano's due process claims are not properly rejected by the principles of *Albright* and *Parratt*, whether they survive the absolute immunity given witnesses in a criminal trial or whether the fabrication of the tapes could have been a legally sufficient cause of the wrongful conviction, we leave to the district court on remand.[108]

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[105] *See Mooney v. Holohan*, 294 U.S. 103, 112, 55 S. Ct. 340, 79 L. Ed. 791 (1935).

[106] *See Buckley v. Fitzsimmons*, 509 U.S. 259, 269-70, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993); *Briscoe v. LaHue*, 460 U.S. 325, 334-36, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983).

[107] *See Buckley*, 509 U.S. at 275-76. Defendants cannot shield any pretrial investigative work with the aegis of absolute immunity merely because they later offered the fabricated evidence or testified at trial. *Id.* at 276; *Spurlock v. Satterfield*, 167 F.3d 995, 1003-04 (6th Cir. 1999) (finding "untenable" the result that officials who fabricate evidence could later shield themselves from liability simply by presenting false testimony regarding the evidence).

[108] *See Zahrey v. Coffey*, 221 F.3d 342 (2d Cir. 2000).

Castellano attempts to salvage his verdict by contending that the violation of the Fourth Amendment supports the verdict because it was the direct cause of all that followed.

In her concurring opinion in *Albright*, Justice Ginsburg articulated a theory that gave a broad reach to seizure under the Fourth Amendment - suggesting that various constraints such as travel restrictions and required attendance at pretrial hearings might constitute a seizure and thereby extend the Amendment's reach toward trial.[109] This view did not attract support in *Albright* and we need not here further define its limits. Rather, we adhere to the view that the umbrella of the Fourth Amendment, broad and powerful as it is, casts its protection solely over the pretrial events of a prosecution. This much is implicit in *Albright*'s insistence that the source of constitutional protection is the particular amendment offering an explicit and extended source of protection against a particular sort of government behavior.[110]

Plainly, the perjury and manufactured evidence that tainted Castellano's arrest also denied him due process when used again at trial to convict him. It is equally plain that his arrest, even his indictment, did not lead inevitably to his trial and wrongful conviction and the damages flowing therefrom. Rather, the prosecution of this case relied on the continued cooperation of Sanchez and Fragozo at each of its subsequent phases. As the Texas Court of Criminal Appeals ultimately held, without their testimony, there was insufficient evidence

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[109] *Albright*, 510 U.S. at 277-81.

[110] *Id.* at 273.

to convict. And while Castellano may recover for all injury suffered by its violation, the Fourth Amendment will not support his damages arising from events at trial and his wrongful conviction.

We need not say that there could never be such a case to conclude it is not this case. Without the perjury at trial there would have been no conviction, yet the perjury at trial did not violate the Fourth Amendment. That is, unless these events at trial are somehow found to be a violation of Castellano's Fourth Amendment rights, there is no constitutional footing for a claim seeking recovery for damages arising from the trial and wrongful conviction, as opposed to his arrest and pretrial detention, given the dismissal of all but Fourth Amendment claims.

It is true that the charge refers to a denial of due process despite the pretrial dismissal of all but the Fourth Amendment, but as we have explained, this reference to due process is confined by the jury instruction.

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We have no occasion here to consider afresh the federal common law footing of our insistence that a state criminal proceeding terminate in favor of a federal plaintiff complaining of constitutional deprivations suffered in a state court prosecution, a rule reflecting powerful governmental interests in finality of judgments.[111] Nor do we face the kindred exercise in deciding when such a claim accrues under applicable limitations periods. Justice Scalia's opinion in *Heck v. Humphrey* answers any question of limitations in the

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[111] *See supra* note 38 and accompanying text.

overwhelming percentage of cases, including this case. It concludes that no such claim accrues until the conviction has been set aside where, as here, the suit calls the validity of the conviction into play.[112]

The heart of Castellano's claim is that the prosecution obtained his arrest and conviction by use of manufactured evidence and perjured testimony, actions attributable to it because Fragozo acted under color of state law. Castellano's proof directly implicated the validity of his conviction and therefore he could not proceed and limitations could not accrue consistent with the principles of *Heck* until the case was dismissed for insufficient evidence by the state trial court on December 29, 1993, on remand from the Texas Court of Criminal Appeals. This suit followed nine months later.[113] Although the parties sparred in the trial court over the general applicable period of limitations and the specific effect of an amended pleading, the parties make no contention here that the trial court's holding that the federal claims were not barred by limitations was in error in either respect.

V

We are persuaded that the judgment must be reversed and the case should be remanded for a new trial of Castellano's claims under the Fourth and Fourteenth Amendments. Defendants are correct that this verdict cannot stand resting solely on the Fourth Amendment for the reason that the award of damages does not distinguish between trial and pretrial

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[112] *See Heck v. Humphrey*, 512 U.S. 477, 484-87, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994).

[113] *Heck* was decided three months before this suit was filed.

events. On remand the district court will grant leave to amend to all parties to conform their claims and defenses to this ruling.

It is suggested that Castellano should not be able to pursue any claims under the Fourteenth Amendment in that the magistrate judge dismissed them before trial and Castellano filed no cross-appeal. It is settled that an appellee may urge any ground available in support of a judgment even if that ground was earlier and erroneously rejected by the trial court.[114] Castellano has attempted to salvage his verdict, as put at oral argument, on the basis that, contrary to the ruling of the magistrate judge, he did state a due process claim and it in practical effect was before the jury. While we have rejected this contention, it is quite plain that to make it requires no cross-appeal. Castellano does not attempt to expand his rights under the judgment by urging that it can be sustained under the Fourteenth Amendment despite the ruling of the trial court.

There remains the question of whether Castellano should also be allowed to plead a state claim of malicious prosecution. The argument is that Castellano should be allowed to separate his federal and state claims resting jurisdiction over the state claims upon 28 U.S.C. § 1367. We are keenly aware that our insistence upon disentangling federal and state law may appear to be no more than a message to the bar about pleading -- clearly state separately your state and federal claims. Yet, although jury trials of

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[114] *See United States v. Hill*, 42 F.3d 914, 917 n.8 (5th Cir. 1995); *Hoyt R. Matise Co. v. Zurn*, 754 F.2d 560, 565 n.5 (5th Cir. 1985); *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254 n.4 (5th Cir. 1976).

cases with both constitutional and supplemental state claims may be little unchanged by our work today, the principle insisted upon here remains important. Our insistence that the anchor of constitutional claims be visible is demanded by our limited jurisdiction, as well as its practical utility in avoiding confusion and dilution of constitutional values. Here Castellano amended his complaint, purposely abandoning his claim under state law. He did so because our case law said the elements of malicious prosecution under state law and under a § 1983 claim were the same. We have pulled that legal rug from all the parties. As we have observed, the magistrate judge's undifferentiated draw upon state law misread *Albright*. But so did this court.

In sum, we reverse the judgment and remand the case for a new trial of Castellano's federal and state claims under the Fourth and Fourteenth Amendments and any state claims he may have. Castellano has not articulated any theory supporting any other claims of lost rights secured under the First, Fifth, and Eighth Amendments.

REVERSED AND REMANDED FOR NEW TRIAL.

CONCURBY: E. GRADY JOLLY; EDITH H. JONES; RHESA HAWKINS BARKSDALE (In Part)

DISSENTBY: E. GRADY JOLLY; EDITH H. JONES; RHESA HAWKINS BARKSDALE (In Part)

DISSENT: E. GRADY JOLLY, Circuit Judge, concurring and dissenting:

I join both Judge Higginbotham and Judge Barksdale in disclaiming the constitutional tort of malicious prosecution. I join Judge Barksdale and Judge Jones in rejecting a remand on

the state claim. I join Judge Barksdale in rejecting the due process claim. I would remand for retrial on whatever remains of the Fourth Amendment claims.

EDITH H. JONES, Circuit Judge, with whom SMITH, CLEMENT, and PRADO, Circuit Judges, join, concurring and dissenting:

Like Judge Barksdale, I applaud the court's decision to jettison its mischievous and unfounded theory constitutionalizing the tort of malicious prosecution. This result is overdue. *See Brummett v. Camble*, 946 F.2d 1178 (5th Cir. 1991); *Kerr v. Lyford*, 171 F.3d 330, 342 (5th Cir. 1999) (Jones, J., concurring); *Gordy v. Burns*, 294 F.3d 722 (5th Cir. 2002). While I largely agree with Judge Higginbotham's discussion of this point, I do not subscribe to the majority's broad remand order.

In particular, the majority purports to allow Castellano to retry state law claims against the two remaining appellants. This is wrong for two reasons. As Judge Barksdale notes, Castellano did not appeal from the magistrate judge order consolidating his state law malicious prosecution claim into a § 1983 claim. Moreover, Castellano has clearly disavowed a state law claim as recently as in his response to the petition for rehearing en banc. The disavowal turns on quirks of state law rather than on this court's constitutional about-face.[115]

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[115] A judgment or settlement of a *Texas Tort Claims Act* case involving a government employer bars the continuation of an action or judgment against an employee of that department "whose act or omission gave rise to the claim." TEXAS CIVIL PRACTICE & REMEDIES CODE § 101.106; *Thomas v. Oldham*, 895 S.W.2d 352, 355-57, 38 Tex. Sup. Ct. J. 375 (Tex. 1995); *see also Owens v. Medrano*, 915 S.W.2d 214 *(Tex. App. - Corpus Christi 1996,*

The majority opinion continues a troublesome trend in this court's recent en banc decisions of deviating from normal standards of appellate practice. *See, e.g., United States v. Southland Mgmt. Corp.*, 326 F.3d 669 (5th Cir. 2003) (en banc) (Jones, J., concurring); *Coggin v. Longview Indep. Sch. Dist.*, 337 F.3d 459 (5th Cir. 2003) (en banc) (Jones, J., dissenting). I dissent from this apparently unnecessary remand.[116]

On the other hand, I cannot agree with Judge Barksdale's argument that Castellano waived any possible constitutional claim by his trial court pleadings. At every step of the litigation, he conscientiously attempted to conform to this court's decisions and to accomplish the ultimately impossible task of harmonizing our case law with that of the Supreme Court. Because this court changed the game technically on Castellano, he should be allowed to retry his claim as one for violation of procedural due process based on the appellants' fabrication of evidence against him.[117] Judge Barksdale also powerfully argues that because Texas law affords Castellano an adequate state remedy in a malicious prosecution claim, the

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writ den'd.) (judgment against City of San Benito on claims including one for malicious prosecution bars suit against its police officers on same claim); *Brand v. Savage*, 920 S.W.2d 672, 674-75 (Tex. App. - Houston [1st Dist.] 1995).

[116] I also dissent from allowing Castellano on remand to try a Fourth Amendment claim properly limited, in events and damages, to pretrial events. He never sought such limited relief in the trial court. Awarding it here is, as Judge Barksdale says, impermissibly lawyering the case for Castellano.

[117] Whether this claim will survive a defense based on the appellants' absolute witness immunity has not been briefed and remains open on remand.

Parratt doctrine withholds a constitutional remedy. While this position may prove correct, we have no post-*Parratt* guidance on it from the Supreme Court, and several courts have allowed claims like Castellano's to proceed without mention of *Parratt*. *See, e.g.*, *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001); *Jean v. Collins*, 221 F.3d 656 (4th Cir. 2000) (en banc); *Brady v. Dill*, 187 F.3d 104, 114 (1st Cir. 1999); *McMillian v. Johnson*, 88 F.3d 1554, 1566-70, *on reh.*, 101 F.3d 1363 (11th Cir. 1996); *Taylor v. Waters*, 81 F.3d 429, 436 n.5 (4th Cir. 1996); *Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988); *Geter v. Fortenberry*, 849 F.2d 1550, 1559 (5th Cir. 1988). For now, I would side with the other appellate courts and concur in this portion of the majority's remand.

RHESA HAWKINS BARKSDALE, Circuit Judge, with whom EMILIO M. GARZA, Circuit Judge, joins, concurring in part and dissenting in part:

As is true of many well meaning, attempted solutions to long-standing, significant problems, the majority opinion offers good news and bad. The good is our finally proscribing a claim under 42 U.S.C. § 1983 for malicious prosecution. The bad comes in two doses: substituted for the freshly minted proscription is an erroneous new § 1983 claim for a due process violation; and this action is being remanded for a new, open-ended trial not only on that new claim but on others as well. This double-barrelled blast of bad news is compounded by Castellano's never having requested on appeal any of the relief provided him so generously, albeit so erroneously, by the majority *sua sponte*. In sum, while I concur fully in the good news, I must respectfully dissent from the bad.

The starting point for the new § 1983 claim's being erroneous is the maxim **"Ubi jus, ibi remedium" -- "Where there is a right, there is a remedy"**. ***See, e.g., Texas & P. R. Co. v. Rigsby***, 241 U.S. 33, 40, 36 S. Ct. 482, 60 L. Ed. 874 (1916). Our federal system counterpoint is: "Where there is a right, there may not be a federal law remedy". Restated, it may be that the remedy must be through state law. This reflects, among other things, the limited powers granted by our federal constitution, the concomitant limited role of federal courts, and the proper balance between state and federal law.

Accordingly, it is indeed passing strange that, on the one hand, the majority properly prohibits pursuing a state law malicious prosecution claim under § 1983, while, on the other, it improperly creates, *sua sponte* no less, a new federal law remedy to be pursued under § 1983: a witness' pre-trial evidence fabrication and perjury at trial equals denial of Fourteenth Amendment due process. (The majority does not state, however, whether the denial is "substantive" or "procedural"; as discussed *infra*, that distinction is a critical factor.) It is even more strange that the majority creates this new remedy in the face of the crystal clear limiting signal in ***Albright v. Oliver***, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994) (holding no claim under § 1983 for malicious prosecution based on asserted Fourteenth Amendment substantive due process right to no prosecution without probable cause), especially the concurrence by Justice Kennedy, ***id.*** at 281. No authority need be cited for the rule that federal courts should avoid constitutional issues if possible, yet the majority goes out of its way, *sua sponte*, to create this new remedy.

On top of all this, the majority remands, *sua sponte*, for a new trial on this new remedy and several other issues. In

other words, on appeal, Castellano has *not* sought any of this relief. Under our long established rules of appellate procedure, this failure alone precludes the majority's *sua sponte* remedy-creation and remand.

Consistent with my dissent from the vacated panel opinion, I concur in the holding that malicious prosecution may not be pursued through § 1983. *See* ***Castellano v. Fragozo***, 311 F.3d 689, 712 (5th Cir. 2002) (Barksdale, J., dissenting), *vacated by* 321 F.3d 1203 (5th Cir. 2003); ***Kerr v. Lyford***, 171 F.3d 330, 342 (5th Cir. 1999) (Jones, J., concurring). This was the sole reason for en banc review. Most regrettably, new, unbriefed issues have been used to diminish, if not swallow, this new holding. Again, the majority has confected, *sua sponte*, a new § 1983 due process claim to replace the now torpedoed § 1983 malicious prosecution claim. Again, to make matters even worse, it remands, *sua sponte*, for an open-ended new trial on this and other issues.

Accordingly, I must respectfully dissent in part. The majority erred in establishing this new § 1983 claim. And, again, in order to establish it and to remand for the new trial on it and other claims, the majority turned its back on long-standing rules of appellate procedure. There is no justification for creating this new § 1983 claim and remanding to allow Castellano yet another round of litigation, despite his repeated failures at trial *and* on appeal to raise the very issues the majority now allows him belatedly to try on remand. We are not a court of original error; yet that is the role played by the majority. It has turned the trial and appeal process on its head.

I.

At this stage, it is critical to appreciate that only two defendants remain in this action: Fragozo, a police officer who was a part-time security guard for Castellano; and Sanchez, who was employed by Castellano. Fragozo and Sanchez are linked in various ways, including alleged fabrication of evidence prior to, and alleged perjury at, Castellano's criminal trial. Fragozo is the requisite "state actor" for § 1983 purposes.

The following defendants no longer remain in this action; the law of the case bars Castellano from bringing any of them back in on remand. Dismissed were: the County of Bexar, Texas; its district attorney's office; its prosecutor; the City of San Antonio, Texas, for which Fragozo was a police officer; and Alfred Castro, an arson investigator for that city's fire department. Immediately after removal to federal court, the county, the district attorney's office, and the prosecutor were dismissed on the basis of prosecutorial immunity. At trial, each of the then remaining four defendants moved for judgment as a matter of law, with that relief being granted the city; and, although the jury returned a verdict against Fragozo and Sanchez, it did not find Castro liable. In sum, of the original seven defendants, only two remain.

Castellano did not cross-appeal the dismissal of these five defendants. Again, the law of the case bars him from bringing any of them back in on remand. Again, only Fragozo and Sanchez remain. In conjunction with those two remaining defendants, the majority opinion contains several errors and omissions related to the procedural history of this action which demonstrate, in part, why the new § 1983 claim and remand are improper.

First, Castellano's third amended complaint presented § 1983 claims under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. According to the majority, all but the Fourth Amendment claim were dismissed. **Maj. Opn.** at 8, 31, and 42. Instead, all but the Fourth and First Amendment claims were dismissed. Castellano abandoned the latter.

According to the majority, Castellano, by amendment to his complaint, abandoned his state law malicious prosecution claim. **Maj. Opn.** at 2 and 45. Instead, over Castellano's objection, the magistrate judge merged that state law claim with Castellano's § 1983 Fourth Amendment claim.

This case was tried on Castellano's now proscribed § 1983 malicious prosecution claim; a quite substantial jury verdict resulted. But, as noted, that verdict was against only two individuals. When they appealed, Castellano did *not* cross-appeal any of his numerous dismissed claims (*i.e.*, § 1983 claims concerning the Fifth, Sixth, Eighth, and Fourteenth Amendments); or the consolidation of his Fourth Amendment claim with his state law malicious prosecution claim; or the dismissal of the other defendants, such as the city. Accordingly, the only issue on appeal -- including before our en banc court -- was the jury's malicious prosecution verdict against Sanchez (Castellano's former employee) and Fragozo (the policeman who had worked for Castellano as a part time security guard and was linked to Sanchez).

Castellano was successful before the panel. At rehearing en banc, he provided no new briefing, electing to rely on his panel brief. As discussed *infra*, the majority states that, although Castellano did not cross-appeal, he nevertheless urged, at some point on appeal, affirmation of the jury's malicious prosecution verdict on the separate basis of due

process. This is simply not correct. And, although the majority does *not* suggest Castellano urged affirmation on the basis of other constitutional and state law claims, it nevertheless remands for a new trial with respect to those claims as well.

II.

The majority remands for a new trial on the following: its new Fourteenth Amendment due process claim (again, as discussed *infra*, it does not distinguish between "substantive" and "procedural"); a Fourth Amendment claim; a state malicious prosecution claim; and "any other" claim under state law when, on remand, Castellano amends his complaint for the fourth time. I would not allow a new trial on any of these.

A.

The new § 1983 due process claim confected by the majority fails on two bases. First, the issue was never presented on appeal. Second, it is barred by the ***Parratt*** doctrine.

1.

Our prudential appellate rules preclude us from entertaining a Fourteenth Amendment due process claim of any stripe. This is especially true because it is a constitutional issue; one we should, and can properly, avoid. In district court, Castellano pleaded a *procedural* due process claim, which was dismissed along with his Fifth, Sixth, and Eighth Amendment claims. Castellano prevailed at a jury trial on another basis (malicious prosecution) against only two of seven defendants.

When those two defendants appealed, Castellano elected not to raise by cross-appeal (*or otherwise*) the dismissal of any of these claims, including his Fourteenth Amendment due process claim (again, he had abandoned his First Amendment claim). In general, even without filing a cross-appeal, an appellee can still present an issue on appeal that does not seek to modify the judgment; in other words, he must cross-appeal only when he seeks to alter it. *E.g.*, ***Kelly v. Foti***, 77 F.3d 819, 822 (5th Cir. 1996). But, obviously, even if a cross-appeal is not required to present an issue, the appellee must still present it on appeal if he wants it considered. *E.g.*, ***United States v. Hill***, 42 F.3d 914, 917 n.8 (5th Cir.), *cert. denied*, 516 U.S. 843, 133 L. Ed. 2d 79 (1995). Castellano did neither.

The majority holds, based upon an extremely thin reed, that Castellano presented the new Fourteenth Amendment due process claim, thereby allowing our court to consider it: "Castellano has attempted to *salvage* his verdict, *as put at oral argument*, on the basis that contrary to the ruling of the magistrate judge he did state a due process claim and it in practical effect was before the jury". **Maj. Opn.** at 44 (emphasis added). Generally, of course, our court does not consider issues raised for the first time at oral argument -- most especially at en banc oral argument. *E.g.*, ***Vargas v. Lee***, 317 F.3d 498, 503 n.6 (5th Cir. 2003). Although Castellano *did plead* a procedural due process claim in district court, he did *not* present a due process claim at any point on appeal -- not in his panel brief, not in his en banc brief (which merely adopted the panel brief), and not even at en banc oral argument.

This claim may not be considered for three reasons: (1) at en banc oral argument, Castellano never urged this court to affirm on due process grounds -- procedural or otherwise; (2)

in his panel and en banc briefs, he never urged affirmance on such grounds; and (3) at issue is a jury verdict for malicious prosecution, to which the cross-appeal exception relied on by the majority, discussed *infra*, does not apply.

a.

Even assuming we should consider an issue presented for the first time at en banc oral argument, I am puzzled by the majority's insistence that, at that argument, Castellano urged affirmation on the basis of due process. Castellano never did so; in fact, on several instances, he refused to make such a request, even when repeatedly pointed in that direction by our court.

There were several procedural due process questions asked Castellano's counsel by several judges. Most notably, immediately after a colloquy over whether procedural, instead of substantive, due process had been left open by ***Albright*** (Castellano presumed, as he has since his first due process claim in district court, that only procedural due process was available), another judge: (1) provided a lengthy description of the procedural due process claim in the context of perjured testimony and an unfair trial; (2) identified the ***Brady v. Maryland***, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), line of cases; and (3) asked Castellano's counsel what sort of argument he would make under this legal theory in support of the judgment. To his credit, because he had never presented the issue, Castellano's counsel responded: "Your honor, I'm not sure I can answer that question today, but I would certainly welcome the opportunity to brief the issue fully if the court would so request". Castellano did *not* then urge, just as he had not previously urged, our court to affirm on the basis of a due process violation. This was confirmed by

the fact that he was not prepared to discuss the point and did not attempt to wing it at en banc oral argument.

b.

Nowhere in his panel or en banc briefs does Castellano request this court to affirm on the basis of a § 1983 due process claim. One issue raised by defendants' appeal was the claimed reversible error caused by the quite erroneous inclusion of the term "due process" in the malicious prosecution jury instruction. But Castellano never contended on appeal that the inclusion of this term was a *correct* statement of the law or that our court should affirm on due process grounds.

In fact, Castellano took the opposite position. In claiming in his panel brief that there was no error in the instructions -- certainly not reversible error -- Castellano was saying that the erroneous inclusion of the term "due process" in the instruction did not affect the trial's outcome. He was *not* asserting that our court should affirm the judgment *because* procedural due process so requires, or even that the jury reached its verdict on that basis. To the contrary, he was maintaining that we should affirm *in spite of* the erroneous inclusion of the words "due process" in the instruction. Neither of Castellano's briefs (panel or en banc) includes a contention that this court should affirm because his due process rights were violated.

c.

Even if Castellano had urged affirmation based on due process grounds, he would have had to cross-appeal in order to do so; the exception to the cross-appeal rule simply does not apply in this instance. The majority states: "It is settled

that an appellee may urge any ground available in support of a judgment even if that ground was earlier and erroneously rejected by the *trial court*". **Maj. Opn.** at 44 (emphasis added; citing ***Hill***, 42 F.3d at 917 n.8; ***Hoyt R. Matise Co. v. Zurn***, 754 F.2d 560, 565 n.5 (5th Cir. 1985); ***City of Safety Harbor v. Birchfield***, 529 F.2d 1251, 1254 n.4 (5th Cir. 1976)). For some instances (not so here), this is a correct statement of the rule. Here, however, the majority mistakenly stretches this rule far beyond its intended scope. Again, our court is *not affirming* a judgment; instead, we are *vacating* a judgment premised on a jury's verdict based on a malicious prosecution, *not a due process*, claim. Again, the exception to the cross-appeal rule only applies where the appellee urges affirmation on the basis of a claim rejected by the district court; Castellano did not do so. He was quite satisfied with, and clung tenaciously to, his judgment based on malicious prosecution.

An examination of the cases relied upon by the majority demonstrates the exception's proper application. In ***Hill***, on defendant's appeal from the sentence imposed following his guilty plea, we allowed the Government to urge affirmation on the basis of a statute that had been rejected by the "district court's ruling". The judgment was affirmed. 42 F.3d at 917 n.8. In ***Zurn***, the appellee maintained that the record provided an alternative ground to support the district court's bench trial decision. Our court held an appellee may take the position on appeal, without filing a cross-appeal, that the record supports "the court's judgment". 754 F.2d at 565 n.5. Likewise, our court held in ***Birchfield*** that the district court's statement, upon dismissing the complaint on two grounds, to the effect that defendant's other contentions were inappropriate for determination on a motion to dismiss, did not require a cross-appeal in order to assert those other contentions on appeal.

529 F.2d at 1254 n.4. None of these cases involves a jury verdict.

To contend that a trial judge's ruling on an issue was erroneous and that we should therefore affirm, without a cross-appeal, on that basis may, in some instances (not so here) be correct. That is not the situation at hand. Castellano has failed to follow *any* of our appellate rules with respect to the due process claim he presented *only* in district court; we are not permitted to consider it.

2.

Assuming *arguendo* that, on appeal, Castellano did properly present a due process claim, it is barred by the ***Parratt*** doctrine. ***Parratt v. Taylor***, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), *overruled in part by* ***Daniels v. Williams***, 474 U.S. 327, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986), held: where state law provides an adequate post-deprivation remedy, the plaintiff is barred from claiming, through § 1983, a procedural due process violation. This prohibition, however, does not extend to claimed violations of recognized substantive rights incorporated in the Fourteenth Amendment. *E.g.*, ***Augustine v. Doe***, 740 F.2d 322 (5th Cir. 1984) (holding ***Parratt*** inapplicable to claimed violation of recognized Fourth Amendment substantive right, but remanding another claim to determine whether state actors' conduct was "official policy", or instead "random and unauthorized" and therefore a procedural due process violation -- a claim barred by ***Parratt***). For this reason, understanding the distinction between procedural and substantive due process, and determining which claim Castellano pleaded in district court, is most essential. Unfortunately, the majority brushes this aside in its relentless

effort to provide Castellano a remedy -- any remedy -- on remand.

Along this line, it is again imperative to recognize the defendants who are, and are no longer, in this action. The county, the district attorney's office, the prosecutor, the city, and its arson investigator are out; only Fragozo and Sanchez remain. In short, Fragozo is the only "state actor" and an extremely tenuous one at that.

As discussed below, in district court, Castellano pleaded a *procedural* due process violation. Indeed, the Supreme Court has only characterized the type of conduct Castellano alleges -- fabricated evidence and perjured testimony -- as violative of procedural, *not substantive*, due process. Carving out a new, stand-alone *substantive* right under the Fourteenth Amendment, one that was not pleaded by Castellano in district court and has *never* been articulated by the Supreme Court, is not warranted, to say the least. This is especially true where the alleged conduct by the state actor (Fragozo, the police officer and part time security guard for Castellano) is of the "random and unauthorized" type pinpointed by ***Parratt*** as being violative of *procedural* due process. ***Parratt***, 451 U.S. at 541.

In district court, Castellano pleaded a procedural, *not substantive*, due process violation. In his third amended complaint, he claimed that he was deprived of his right to due process and a fair trial because the defendant witnesses allegedly fabricated evidence and gave perjured testimony. Defendants were of the view that, post-***Albright***, a § 1983 claim for substantive due process was prohibited. Therefore, they contended in their summary judgment motions that Castellano had pleaded a proscribed substantive due process claim that should be dismissed.

In response, Castellano seized every opportunity to clarify his position, *denying* that his claim was for a violation of *substantive* due process; in one instance, he called defendants' characterization "disingenuous". Instead, Castellano carefully explained that, because ***Albright*** apparently did not allow a stand-alone substantive due process claim, he was not asserting one.

Whether this interpretation of ***Albright*** is accurate is irrelevant. For the purpose of deciding what claims Castellano presented in district court, we need look no further than to his own interpretation. The only *substantive* constitutional violations Castellano claimed were under the First, Fourth, Fifth, Sixth, and Eighth Amendments, made applicable through the Fourteenth Amendment. And, for a separate Fourteenth Amendment claim, he asserted violation of his right to procedural due process and was deliberate in explaining to the magistrate judge that he was *not* claiming a violation of substantive due process.

Pursuant to ***Parratt***, the existence of an available independent and adequate state remedy precludes Castellano's procedural due process claim. The only exception is when the plaintiff "pleads and proves" that available state remedies are inadequate to redress the wrong. *E.g.*, ***Copeland v. Machulis***, 57 F.3d 476, 479 (6th Cir. 1995). Castellano did not do so; on the contrary, he pushed for relief through an independent state malicious prosecution claim, apparently appreciating its "adequacy" enough to object when the magistrate judge consolidated it with his Fourth Amendment claim.

Castellano's pleadings aside, and as noted, the Supreme Court has only characterized conduct of the type alleged by Castellano as a violation of procedural due process. The majority correctly cites ***Mooney v. Holohan***, 294 U.S. 103,

55 S. Ct. 340, 79 L. Ed. 791 (1935), for the proposition that fabricated evidence and perjured testimony are violative of due process. **Maj. Opn.** at 39. But as Chief Justice Rehnquist explained in the ***Albright*** plurality opinion, such activities are properly understood, under the ***Mooney***, ***Brady*** line of cases, to implicate procedural, *not substantive,* due process:

> ***Winship*** 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) undoubtedly rejected the notion that all of the required incidents of a fundamentally fair trial were to be found in the provisions of the Bill of Rights; but it did so as a matter of procedural due process: "This notion [that the government must prove the elements of a criminal case beyond a reasonable doubt] -- basic in our law and rightly one of the boasts of a free society -- is a requirement and a safeguard of due process of law in the historic, *procedural* content of 'due process.'" *Similarly*, other cases relied on by the dissent, including ***Mooney*** ... [and] ***Brady***... were accurately described in [***United States v. Agurs***, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) as "dealing with the defendant's right to a fair trial mandated by the Due Process Clause of the Fifth Amendment to the Constitution."

Albright, 510 U.S. at 273 n.6 (citations omitted; emphasis added).

In fact, the conduct described in some of these cases, *prosecutorial* -- not witness -- fabrication of evidence and its knowing use of perjured testimony, for example, is much more fundamental to the fairness of a trial than, as with Fragozo and Sanchez, a witness' independent fabrication of evidence and perjury -- conduct not linked to the prosecutor's conduct. Nevertheless, the Supreme Court characterized such

prosecutorial conduct as *procedural*. Indeed, this is why, for deciding whether there is a procedural due process violation, ***Parratt*** and its progeny consider whether conduct was "random and unauthorized" (invoking procedural due process), or instead part of an established state procedure that is fundamentally flawed. *See* ***Parratt***, 451 U.S. at 543; *see also* ***Copeland***, 57 F.3d at 479. Here, the former, not the latter, factor is in play concerning the two remaining defendants.

This procedural/substantive distinction is indispensable to § 1983 analysis because, as discussed, ***Parratt*** precludes § 1983 claims predicated on procedural due process where there is an adequate state remedy, but does not preclude such claims predicated on the violation of substantive rights that have been incorporated into the Fourteenth Amendment. But even if we assume *arguendo* that, in district court, Castellano did claim a violation of substantive due process (an assumption quite forcefully rejected by Castellano), it is not at all clear that a witness' fabricating evidence and commiting perjury at trial is a sufficient basis for a substantive due process violation.

As noted, courts have permitted § 1983 recovery for *recognized* substantive violations, despite the availability of state law remedies. *See, e.g.,* ***O'Quinn v. Manuel***, 773 F.2d 605, 608 (5th Cir. 1985) (concluding the ***Parratt*** doctrine, while barring § 1983 claim for procedural due process, does not bar one for claimed violation of the "substantive eighth amendment right to be free from cruel and unusual punishment") (emphasis added); ***Augustine***, 740 F.2d at 327 (holding ***Parratt*** doctrine does not bar § 1983 claim for violation of the "substantive [Fourth Amendment] right protected by the Constitution against infringement by state governments"). But I find no cases, and the majority cites

none, where a court has *recognized* a substantive due process violation for a witness' evidence fabrication and perjury. And some circuits have interpreted ***Albright*** as precluding all § 1983 claims that are predicated on a no more specific constitutional violation than substantive notions of due process of law (but as allowing procedural due process or articulated constitutional provisions such as the Fourth Amendment). *See, e.g.,* ***Merkle v. Upper Dublin School Dist.***, 211 F.3d 782, 791 (3d Cir. 2000).

In an apparent effort to side step the ***Parratt*** bar, the majority refers in its opinion only to "due process" (due process *simpliciter*?). *See, e.g.*, **Maj. Opn.** at 2-3, 35, and 38. But, to truly escape ***Parratt***, the majority must mean *substantive* due process. The ***Parratt*** doctrine precludes simply blending procedural and substantive due process; instead, it requires identifying the precise nature of the claimed constitutional violation.

The conduct about which Castellano complained in district court constitutes a procedural due process violation for which state law provides an adequate post-deprivation remedy. Remember, Castellano is not seeking a new criminal trial because his trial was fundamentally unfair. The state courts provided habeas relief, and the State did not re-prosecute. Instead, Castellano is seeking damages for alleged wrongs -- now only by Sanchez and Fragozo -- that occurred before and during his criminal trial. In such instances, the state post-deprivation remedies are the "best the state can do" to allow injured individuals recovery after injury has occurred. ***Augustine***, 740 F.2d at 327. Such state remedies are sufficient to address due process violations that are "random and unauthorized" and therefore violate procedural due process. ***Id.***

The majority is attempting to treat conduct the Supreme Court has already characterized as potentially violative of procedural due process as though it is also violative of a recognized substantive constitutional right (as with ***O'Quinn*** and the Eighth Amendment or **Augustine** and the Fourth). In so doing, it apparently hopes that Castellano's § 1983 claim will escape the effect of ***Parratt*** and somehow become "supplementary to [rather than precluded by] state remedies for constitutional injury". **Maj. Opn.** at 37. In support, the majority cites ***Monroe v. Pape***, 365 U.S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961). ***Id.*** But that case, involving police officers breaking into and ransacking a home, concerned the recognized substantive Fourth Amendment right made applicable by the due process clause of the Fourteenth Amendment. The majority attempts to slip past the ***Parratt*** bar on this same ground. Effectively, the majority can only be considering Castellano's claim as some sort of substantive due process claim, but has avoided the damning label.

The alleged conduct by Sanchez and Fragozo is precisely the type of "random" and "unpredictable" activity that ***Parratt*** expressly prohibits being remedied through a claim under § 1983 - this conduct relates to procedural due process and there are adequate state remedies. Again, ***Parratt*** distinguishes between the "random and unauthorized (and hence unpredictable) conduct of a state actor" (such as is at issue here) and "conduct that the state can contain and direct by instituting procedural safeguards". ***Augustine***, 740 F.2d at 327. The availability of a post-deprivation state tort remedy does satisfy due process in the former instance, but not in the latter. ***Id.*** Again, the conduct at issue here -- alleged witness fabrication of evidence and perjury -- is precisely the sort of "random and unauthorized" conduct to which ***Parratt*** applies; therefore, the existence of adequate post-deprivation state

remedies, such as through a malicious prosecution claim, bars a § 1983 procedural due process claim.

Relying almost exclusively on Justice Kennedy's ***Albright*** concurrence, the majority concludes that "the ***Parratt*** doctrine is [not] applicable to Castellano's claim that the manufacturing of evidence and use of perjured testimony at trial ... denied him due process". **Maj. Opn.** at 35. The majority first claims that Justice Kennedy warned of the contra-indications of ***Parratt***, noting that in some instances federal power ought to be vindicated, rather than rely on state law remedies. This is true; but that is only part of the equation. The majority then refers, by way of example, to ***Monroe***'s "reading of § 1983 as supplementary to state remedies for constitutional injury". **Maj. Opn.** at 37. Returning to Justice Kennedy, the majority states that this notion -- of § 1983 claims supplementing state remedies -- "finds expression in Justice Kennedy's statement that a claim of malicious initiation of criminal proceedings 'differs in kind' from claims that implicate 'fundamental fairness in the determination of guilt at trial'". **Maj. Opn.** at 37-38. The majority then determines that this latter type of claim is one "in which the federal power ought to be vindicated" and is therefore not barred by ***Parratt***. ***Id.***

As a preliminary matter, Justice Kennedy made a factual distinction between malicious initiation of charges and conduct that occurs during a trial; this was only a factual, chronological distinction. The majority's conclusion is that the distinction Justice Kennedy made between the conduct in Albright's case and in other cases is actually a significant legal decision, identifying the conduct in those other cases as "beyond the reach of ***Parratt***". **Maj. Opn.** at 38. Justice Kennedy never made such a conclusion. As noted, Chief Justice Rehnquist, writing for the plurality, characterized

these as violations of procedural due process; Justice Kennedy did not challenge that.

That Justice Kennedy walked Albright's conduct through the ***Parratt*** analysis, but did not do so for other types of conduct (like that at issue here), in *no way* implies that ***Parratt*** does not apply to the latter. ***Albright*** did not involve witness evidence fabrication and perjury; accordingly, Justice Kennedy did not address it. But, by walking the conduct at issue here through the steps Justice Kennedy applied in ***Albright***, it is clear that ***Parratt***'s proscriptions are a perfect fit.

Even assuming, *arguendo*, that Justice Kennedy's factual distinction is meant to imply that there are substantive due process rights in the fundamental fairness of a trial, he does not identify conduct sufficient to invoke them beyond a *prosecutor's* knowing use of perjury (***Mooney***) and the requirement of proving elements of a criminal conviction beyond a reasonable doubt (***Winship***). It is the majority that holds that a *witness'* evidence fabrication and perjury are sufficient to invoke it.

But again, a due process claim can bypass ***Parratt*** in only *two* ways: (1) the claim is substantive; or (2) it is procedural, but available state remedies are inadequate. There is no dispute that Castellano has neither pleaded nor proved the inadequacy of state remedies. Apparently this is why the majority finds it necessary to provide cover for the only possible claim -- substantive due process. But, because Castellano argued to the magistrate judge against construing his claim as substantive, the majority labels it, simply, "due process".

To support bypassing ***Parratt***, the majority points to Justice Kennedy's statements that courts have

> "been cautious in invoking the rule of ***Parratt***" and that "we want to leave an avenue open for recourse where we think the federal power ought to be vindicated". **Maj. Opn.** at 37 (*quoting* ***Albright***, 510 U.S. at 284-85 (Kennedy, J., concurring)). Again, the majority opines that one avenue for vindication is where a witness fabricates evidence or commits perjury; but, again, Justice Kennedy never says that. Again, the majority cites language from *earlier* in Justice Kennedy's concurrence, where he made a factual distinction, without elaboration, on the difference between the type of conduct in ***Albright*** and that in other cases. *See* ***Albright***, 510 U.S. at 283 (Kennedy, J., concurring). Of particular importance to this action, Justice Kennedy then cautioned, however:
>
> But the price of our ambivalence over the outer limits of ***Parratt*** has been its dilution... The ***Parratt*** rule has been avoided by attaching a substantive rather than procedural label to due process claims (a distinction that if accepted in this context would render ***Parratt*** a dead letter) and by treating claims based on the Due Process Clause as claims based on some other constitutional provision.

Albright, 510 U.S. at 285 (Kennedy, J., concurring). (Of course, this is precisely what the majority is doing -- trying to characterize the two remaining defendants' conduct as violative of something other than procedural due process, so that the new claim can slip past ***Parratt***.) To stem this "dilution", Justice Kennedy offers this compelling guidance:

> These evasions are unjustified given the clarity of the ***Parratt*** rule: In the ordinary case where an injury has been caused *not by a state law, policy, or procedure, but by a random and unauthorized act that can be remedied by state law*, there is no basis for intervention under § 1983, at least in a suit based on "the Due Process Clause of the Fourteenth Amendment *simpliciter*".

Id. (emphasis added). There can be no more accurate description of Castellano's due process claim in district court. (Again, he does not present such a claim on appeal.)

As a final note, the very reason why, in state court, Castellano added federal law claims must not be overlooked. He did so through amended complaints in an apparent effort to avoid state law immunity. Justice Kennedy warned: "The commonsense teaching of ***Parratt*** is that some questions of property, contract, and tort law are best resolved by state legal systems without resort to the federal courts". ***Albright***, 510 U.S. at 284 (Kennedy, J., concurring). He later notes that "the ***Parratt*** principle respects the delicate balance between state and federal courts and comports with the design of § 1983." ***Id.*** ***Parratt*** makes very clear: "Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process". ***Parratt***, 451 U.S. at 544. In ***Parratt***, there was "no contention that the procedures themselves [were] inadequate". ***Id.*** at 543. Nor is there one here.

B.

In his third amended complaint, Castellano added a Fourth Amendment claim. As noted, the magistrate judge consolidated it with Castellano's original state law malicious prosecution claim. Although Castellano objected to this rejection of the state law malicious prosecution claim as a separate, stand-alone claim, he never objected to the transformation of the Fourth Amendment claim into a § 1983 malicious prosecution claim. And, as with his procedural due process claim, he did *not* present the issue on appeal.

We should not remand for a new trial on a Fourth Amendment claim. At trial and on appeal, despite ***Albright***, Castellano repeatedly turned his back on the one claim he had under federal law -- the Fourth Amendment. He was denied trial on a Fourth Amendment claim and a supplemental state malicious prosecution claim; but, he elected not to contest that denial on appeal.

Litigation must come to an end; fairness must be shown both sides. In my view, it is quite unfair to defendants, especially in the light of what repeatedly took place at trial concerning the Fourth Amendment claim, to afford Castellano yet another opportunity to try such a claim.

C.

As noted, Castellano originally pleaded a state malicious prosecution claim. As also noted, the majority incorrectly states he "amended his complaint, purposely abandoning [this] claim under state law". **Maj. Opn.** at 45. In his original state court complaint, Castellano presented only a malicious prosecution claim. Following his addition of § 1983 claims (apparently to avoid state law immunity) and the subsequent

removal of the action to federal court, the magistrate judge ruled that Castellano's action was based entirely on malicious prosecution in the context of a claim brought pursuant to § 1983. Castellano's motion for reconsideration was denied.

The magistrate judge erred in placing the state law claim under § 1983; Castellano identified the error and objected. But, as noted, he never presented the issue on appeal. Instead, he contended in our court that the judgment was *correct* (and, by extension, that the consolidation ruling upon which the verdict is based should stand). Significantly, the majority never suggests Castellano presented this issue on appeal. Nevertheless, it remands for a new trial to include a malicious prosecution claim.

The majority states that Castellano "purposely abandoned" his state law malicious prosecution claim "because our case law said the elements of malicious prosecution under state law and under a § 1983 claim were the same". **Maj. Opn.** at 45. As noted, this is inaccurate; the magistrate judge, not Castellano, merged the claims. Presumably, the majority, out of sympathy for Castellano, would *still* give him the benefit of this change in our precedent, considering it unfair for Castellano to be burdened by our earlier erroneous precedent.

But Castellano was not so burdened. He made a specific objection by motion to the consolidation (which was denied). Thereafter, as noted, he did *not* present the issue on appeal -- even though he had every reason to do so. He was quite aware of both ***Albright*** and Judge Jones' extremely compelling concurrence in ***Kerr***, and had access to the law with respect to this issue in other circuits. Every factor on which our court now relies in changing the law concerning § 1983 malicious prosecution was either expressly or constructively before Castellano in district court. Indeed, he considered the

magistrate judge's ruling on this issue erroneous. It was his option, therefore, to present this contention on appeal. He elected not to do so. We cannot now pretend that he did. Nor can we allow him to pursue this claim on remand.

D.

As a final act of lawyering this action for Castellano, the majority also allows him to plead "any [other] state claims he may have" on remand. **Maj. Opn.** at 45. This action has become open-ended. In essence, the majority is starting it anew. Instead, it should be at an end.

III.

Sympathy for a litigant does not permit us to entertain claims not presented on appeal -- most especially, those of constitutional dimension. It most certainly does not allow us to create, *sua sponte*, a new remedy for that litigant and an erroneous remedy at that. At Castellano's election, only the now-proscribed § 1983 malicious prosecution claim was at issue before our court; the following claims were not: (1) Fourteenth Amendment due process; (2) Fourth Amendment; (3) state malicious prosecution; and (4) any other state claim Castellano can dream up on remand. In addition to the new § 1983 due process claim's being violative of ***Parratt***, any relief the majority accords Castellano on these issues greatly exceeds the scope of this appeal and is violative of long established appellate rules to which we require parties to adhere -- day in and day out -- at their prejudice.

Accordingly, although I fully concur in our finally proscribing a claim under § 1983 for malicious prosecution, I must respectfully dissent from both the creation of the new § 1983 due process remedy and the remand of this action for

yet another round of litigation. Instead, I would vacate and render for appellants. This is not an unfair result -- far from it. It is the result for which Castellano, by his election on appeal, rolled the dice ... and lost.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 00-50591

[Filed February 5, 2003]

ALFRED CASTELLANO,	)
Plaintiff-Appellee	)
	)
versus	)
	)
CHRIS FRAGOZO, Etc; ET AL,	)
Defendants,	)
	)
CHRIS FRAGOZO, Individually and	)
in his Official Capacity as a	)
San Antonio Police Officer;	)
MARIA SANCHEZ, Individually	)
Defendants-Appellants.	)
	)

Appeal from the United States District Court for the
Western District of Louisiana.
SA-96-CV-346-JWP.
John W. Primomo, US Magistrate Judge.

ON PETITION FOR REHEARING EN BANC

BEFORE: KING, Chief Judge, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, DENNIS and CLEMENT, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the petition for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 00-50591

[Filed November 20, 2002]

ALFRED CASTELLANO,
Plaintiff-Appellee,

versus

CHRIS FRAGOZO, Etc.; ET AL.,
Defendants,

Chris FRAGOZO, Individually and in his Official Capacity as a San Antonio Police Officer; Maria SANCHEZ, Individually,
Defendants-Appellants.

Appeals from the United States District Court for the Western District of Texas. SA-96-CV-346-JWP.
John W Primomo, US Magistrate Judge.

Before BARKSDALE and STEWART, Circuit Judges, and DUVAL, District Judge.[1] RHESA HAWKINS BARKSDALE, Circuit Judge, dissenting.

STANWOOD RICHARDSON DUVAL, District Judge:

This legal saga began eighteen years ago. The central issues in this suit for malicious prosecution under 42 U.S.C. § 1983 are: (1) whether the jury instructions constituted reversible error, (2) whether there was sufficient evidence to support the jury's verdict in favor of the plaintiff, and (3) whether there was sufficient evidence to support the award of both economic and compensatory damages. The trial court affirmed the jury's verdict in all respects. For the following reasons, we AFFIRM.

I. Background Facts

A. Castellano's Arrest and Criminal Trial for Arson

Alfred Castellano ("Castellano") is the owner of Fred's Fish Fry ("Fred's"), a collection of fast food restaurants in San Antonio, Texas, which he and his father started in 1963. On October 31, 1984, one of Fred's restaurants ("Fred's No. 7") was destroyed by fire. After investigation, the San Antonio fire department concluded that the fire had been the result of an "inside arson." That conclusion was based, initially, on evidence gathered at the scene of the fire by Alfred Castro ("Castro"), a San Antonio arson investigator (and former defendant in this action), which included jars of

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[1] District Judge of the Eastern District of Louisiana, sitting by designation.

gasoline, a disconnected natural gas line from the water heater, and two wrenches found inside Fred's No. 7. Castro's initial opinion was later confirmed by allegations made and evidence produced by Maria Sanchez ("Sanchez"),[2] a former Fred's employee, and Chris Fragozo ("Fragozo"),[3] a San Antonio police officer who worked off-duty as a security officer for Fred's, consisting of: (1) tapes of conversations allegedly held between Sanchez and Castellano wherein Castellano implicated himself in the arson of Fred's No. 7 and (2) Sanchez's sworn testimony that Castellano had tried on previous occasions to burn the restaurant. With that evidence, Castro concluded that there was probable cause to believe Castellano was responsible for the fire.

On November 8, 1984, Castellano was arrested, at his office, for committing arson on Fred's No. 7. After entering his place of business, the police immediately grabbed Castellano, placed him in handcuffs, searched his person and office, and took him to the police station. Thereafter, Castellano remained handcuffed and was seated in a room while he waited to be fingerprinted. When the press arrived, the police left Castellano in handcuffs while they slowly paraded him through the crowd of reporters towards the front door. Throughout this ordeal, Castellano was not given the

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[2] A few weeks before the fire, Castellano suspected Sanchez of stealing money from the restaurant and requested that she take a polygraph test in accordance with company policies. Sanchez repeatedly refused to take the test and was fired from Fred's a few days after the fire.

[3] Fragozo left his employment with Fred's allegedly after Castellano refused to use his position on the Fire and Police Civil Service Commission to improperly obtain a copy of the lieutenant's test for Fragozo before the test was administered.

opportunity to call his family or business associates to warn them of the allegations before the story appeared on the evening news.

At the time of his arrest, Castellano was a respected business man, was serving on the Fire and Police Civil Service Commission, and was active in community politics. Following his arrest, however, he was asked to resign his position on the Commission. The story and its permutations intermittently appeared on the evening news and in the newspaper for a over a year.

At his criminal trial, the evidence implicating Castellano in the arson was, for the most part, twofold. First, there was the testimony of Sanchez who testified that: (1) in the days before the fire, Castellano confided in her that he intended to burn Fred's No. 7 and that he attempted to burn the restaurant on prior occasions; (2) Castellano instructed her to purchase Halloween items for the restaurants--specifying that there should be a candle in Fred's No. 7; and (3) she related Castellano's plan to burn Fred's No. 7 to Fragozo, who suggested that she tape record her conversations with Castellano so she would not be blamed for the fire. Those recorded conversations, containing statements allegedly made by Castellano implicating himself in the arson and other arson attempts, were admitted as evidence of Castellano's guilt. Also introduced as evidence was the fact that, at the time of the arson, Fred's No. 7 was operating at a loss and Castellano had recently increased his insurance on the restaurant.

Castellano vehemently denied the accuracy of the tape and claimed that Sanchez and Fragozo altered the tapes in an act of revenge. He also introduced an expert witness who testified that the tape was a fraud-created by manipulating conversations between Sanchez and Castellano.

At the conclusion of the criminal trial, the jury convicted Castellano of arson and he was sentenced to five years probation. He subsequently filed three writs of habeas corpus --the third of which was granted by the Texas Criminal Court of Appeals. At the writ hearing, the court heard uncontradicted testimony from Clemencia Jiminez ("Jimenez"), an employee of Fred's that: (1) Sanchez told her, before Castellano's conviction, about the plan to tape record Sanchez's conversations with Castellano and alter them to implicate him in the arson and asked her to corroborate Sanchez's story with the district attorney; (2) after Castellano's conviction, Sanchez told her she "had gotten" Castellano without her help; and (3) Fragozo attempted to enlist her as a witness against Castellano.[4]

The findings of fact issued by the habeas judge following the hearing were adopted by the Texas Criminal Court of Appeals, and included Finding of Fact No. 3 that Fragozo "attempted to enlist Clemencia Jiminez as a witness against [Castellano] and aided Maria Sanchez in altering the tape recordings offered into evidence. The tapes were altered to appear that [Castellano] was admitting to the arson when in fact he had no knowledge of its commission" and Finding of Fact No. 6 that "Sanchez and Fragozo collaborated together and without their testimony and the altered tapes, there is insufficient evidence to sustain a finding of guilt in this case."[5]

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[4] *Ex parte Castellano*, 863 S.W.2d 476, 478-79 (Tex. Crim. App. 1993).

[5] *Id.* at 479.

Castellano's conviction was overturned and his case was remanded for a new trial in 1993. On remand, however, the district attorney dismissed the case for "lack of evidence" and Castellano's record was later expunged.

B. Civil Suit for Malicious Prosecution

On September 23, 1994, Castellano filed the instant civil action in the District Court of the 288th Judicial District, Bexar County Texas for malicious prosecution under 42 U.S.C. § 1983 against Fragozo, individually and in his capacity as a San Antonio Police Officer, Sanchez, Castro, and others. Castellano claimed that the defendants maliciously prosecuted him in violation of his First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights and contended that he had suffered a myriad of damages, including injury to his feelings, reputation, mental health, and character. Castellano also complained that he had been "severely impaired in his social and mercantile standing" and continued to suffer great embarrassment, humiliation, and anguish. Finally, Castellano asserted that his business had lost clientele, profits, and good standing as a direct and proximate result of the criminal prosecution.

The case was subsequently removed to federal court where it was referred to a magistrate judge. Thereafter, on Sanchez's motion for summary judgment, the court dismissed Castellano's malicious prosecution claims based on the Fifth, Sixth, Eighth, and Fourteenth Amendments. Relying on *Albright v. Oliver*[6] and *Johnson v. Louisiana Department of*

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[6] 510 U.S. 266, 274, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994).

Agriculture,[7] however, the court sustained Castellano's malicious prosecution claims based on alleged violations of his First and Fourth Amendment rights. The court also determined that Castellano's third amended complaint contained sufficient allegations to support his malicious prosecution claim under the Fourth Amendment.[8]

The trial was held in April of 2000. As to his individual damages, Castellano testified that he: (1) was embarrassed from the exposure his case received in the media--even after his conviction was overturned, (2) was asked to resign from his civil service position, (3) was unable to obtain loans to expand his business, and (4) was denied coverage for fire insurance. Castellano also stated that at the time of the fire, he was attempting to franchise his business. He had started a construction company, developed a concept of constructing inexpensive prefabricated buildings, and expended resources hiring legal counsel, preparing literature, and obtaining a license in California. However, Castellano explained that since his conviction for arson, he had been unable to franchise his business and stated that his personal losses stemming therefrom "could have been in the millions."

Also testifying at trial was Castellano's economist, Gene Trevino ("Trevino"), who opined as to the measure of damages Castellano suffered, individually, as a result of his failure to franchise his business after the arson conviction.[9]

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[7] 18 F.3d 318 (5th Cir. 1994).

[8] Castellano subsequently dismissed his cause of action under the First Amendment.

[9] At trial, defendants objected to the inclusion of Trevino's testimony arguing, in part, that they were unfairly surprised by his

Specifically, Trevino testified that Castellano's personal economic loss as a result of his inability to franchise his business was $1,200,000. He further explained that this amount was based on the assumption that Fred's would have been able to franchise at a rate of one restaurant a year for twelve years and, as such, Castellano could have increased his personal salary by an additional $100,000 per year for each of those years.[10]

Jiminez and Louis Cantu ("Cantu"), both employees of Fred's, also testified at the trial. Jiminez testified that (1) Sanchez and Fragozo attempted to enlist her to "be on their side" during the criminal trial and testify against Castellano and (2) after Castellano's conviction Sanchez stated that she had "done what she set out to do." Cantu testified, *inter alia*, that Fragozo and Castro had come to his home, ordered him into Fragozo's car, and attempted to persuade him to alter the statement he had given previously to the police so as to implicate Castellano in the arson of Fred's. Cantu further explained that Fragozo pointed a gun at him when he refused to change his statement as they requested.

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testimony because before trial he had only opined as to the amount of damages Fred's sustained--not the amount of damages Castellano suffered *personally* after his conviction, derivative from his business losses. The court permitted Trevino to testify as to the damages that Castellano suffered *personally* as a result of malicious prosecution, such as his loss of executive compensation as a result of being unable to franchise Fred's. However, Trevino was not permitted to testify as to the losses sustained by Fred's.

[10] Trevino further explained that considering the number of restaurants Castellano opened in the past, his assumption that Fred's would have franchised at a rate of one restaurant a year was conservative.

At the close of Castellano's case, Sanchez, Fragozo, and Castro each moved for judgment as a matter of law ("JMOL") under Federal Rule of Civil Procedure 50(a), arguing, in part, that the law surrounding § 1983 malicious prosecution claims was unsettled.[11] In her Rule 50(a) motion, Sanchez also argued that (1) Castellano had not proved a "lack of probable cause" with respect to the criminal proceedings or her actions, (2) Castellano's complaint did not specify that he was seeking *personal* damages derivative from his business losses after his conviction, and (3) there was insufficient evidence that she conspired with Castro or Fragozo. Fragozo argued that there was insufficient evidence to prove that his actions were not objectively reasonable for purposes of qualified immunity. Both motions were denied.

At the close of all the evidence, but before the case went to the jury, the defendants renewed their JMOL motions for the same reasons articulated at the close of Castellano's case. The motions were denied.

Thereafter, the jury instructions and interrogatories were presented to the magistrate judge and discussed at a charge conference before they were read to the jury. At that time, no one objected to the instructions or interrogatories as they related to "malicious prosecution."

Following its general jury instructions as to the types of evidence, credibility of witnesses, burdens of proof, etc., the

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[11] Defendants explained that they were relying on Judge Edith Jones's concurring opinion in *Kerr v. Lyford*, 171 F.3d 330, 342-343 (5th Cir. 1999) (Jones, E., specially concurring) (addressing, in part, whether a cause of action for malicious prosecution required proof of any post-arraignment seizure).

court provided the following charge for "malicious prosecution":

> . . . Castellano claims that Alfred Castro and Chris Fragozo, while acting under color of law, intentionally violated his constitutional right to due process by maliciously prosecuting him for the criminal offense of arson. Castellano further claims that Maria Sanchez, as an individual, intentionally violated the same constitutional right.

To prove such violation, Castellano must prove each of the following by a preponderance of the evidence: One, the defendants intentionally committed the acts that deprived him of due process; two, in so doing, the defendants acted under "color of law" of the State of Texas; and three the defendants' acts caused his damages.

First, to prove the defendants intentionally committed acts depriving him of due process, Castellano must prove they maliciously prosecuted him for the criminal offense of arson. To prove this claim, Castellano must establish by a preponderance of the evidence each of the following:

> One, the defendants caused or commenced or aided a criminal proceeding against him;
>
> Two, the defendants acted without probable cause;
>
> Three, the criminal action terminated in his favor;
>
> Four, he was innocent of arson;
>
> Five, the defendants acted with malice by prosecuting him for arson;

And six, he was damaged by the criminal proceeding.

. . . . .

To determine whether Maria Sanchez committed malicious prosecution you must also determine whether she conspired with another while the other was acting under color of law, and they conspired with the intent to commit malicious prosecution. . . .

In instructing the jury as to the potential damages that they could award, the court explained:

> If you find that Castellano was maliciously prosecuted by any of the defendants, then you must determine an amount that is fair compensation for all of Castellano's damages. The purpose of these compensatory damages is to make Castellano whole--that is, to compensate Castellano for the damage that Castellano has suffered. Compensatory damages are not limited to just out-of-pocket expenses that Castellano may have incurred because of his injury. You may award damages for any injury that Castellano sustained, including any mental anguish, loss of earning potential, and/or loss of capacity for enjoyment of life that Castellano has experienced in the past. However, Castellano's compensatory damages may not include actual damages to Fred's Fish Fry, Inc. as a result of the fire or any malicious prosecution. Castellano's damages in relation to Fred's Fish Fry may only include his own damages you find resulted from any damages to Fred's Fish Fry, Inc. as a consequence of any of the defendants' malicious prosecution.

> If the plaintiff has proved that the defendants acted with malice or willfulness or with callous and reckless indifference to the safety or rights of others, you may also award punitive damages against them. . . . The amount of an award of punitive damages must not reflect bias, prejudice, or sympathy toward any party. However, the amount can be as large as you believe necessary to fulfill the purposes of punitive damages.

Similarly, the jury interrogatories directed the jury to consider whether, by a preponderance of the evidence, the defendants deprived Castellano of his "constitutional rights by committing malicious prosecution" as defined in the court's instruction. As to damages, the jury interrogatories queried:

> Interrogatory No. 4:
>
> What sum of money will fairly and reasonably compensate Castellano for his actual damages, if any, that he proved were the cause-in-fact and proximate cause of the defendants' violation of his constitutional rights? Provide the amount, in any in dollars and cents.
>
> Interrogatory No. 5.:
>
> Do you find from a preponderance of the evidence that the listed defendants acted with malice or wilfulness or with callous and reckless indifference to the rights of Castellano, as defined in the court's instruction?

And, Interrogatory No. 6:

> What sum of money will fairly and reasonably compensate the plaintiff for his punitive damages, if

any, that he proved resulted from the violation of his constitutional rights by the listed defendants?

Damages were submitted globally to the jury.

On April 17, 2002, the jury rendered its verdict and found that Fragozo, but not Castro, had acted under color of law to deprive Castellano of his constitutional rights by committing malicious prosecution. As to Sanchez, the jury concluded that she had conspired with Fragozo, while he was acting under color of law, with the specific intent to deprive Castellano of his constitutional rights. Accordingly, the jury awarded $3,000,000 in compensatory damages and $500,000 in punitive damages -- to be divided evenly between Sanchez and Fragozo.

C. Post-Trial Motions

Thereafter, Sanchez and Fragozo filed motions for judgment as a matter of law or, in the alternative, a new trial. Therein, they argued that: (1) there was no basis for a § 1983 malicious prosecution claim based on the Fourteenth Amendment; (2) Castellano had not pled a cause of action for malicious prosecution under the Fourth Amendment; (3) Castellano had not proven the elements of the crime of malicious prosecution, including his "actual innocence" as to the arson charge and the lack of probable cause for his criminal prosecution; and (4) the court's jury instruction as to malicious prosecution was erroneous because it suggested that Castellano's cause of action arose under the Fourteenth Amendment--rather than the Fourth Amendment. Sanchez also posited that there was insufficient evidence to establish that she conspired with another individual acting under color of law with the specific intent to violate Castellano's

constitutional rights. Fragozo also contended that Castellano failed to prove that he acted with malice.

As to the damage award, Fragozo and Sanchez argued that: (1) Castellano was not entitled to receive *individual* damages that he sustained derivative from damages to his business after his conviction because his complaint was void of any such allegation, (2) the evidence supporting Castellano's request for damages for anticipated future lost profits or future compensation from the failure to franchise Fred's was speculative, (3) they were unfairly surprised by Trevino's testimony because his pre-trial report focused solely on corporate damages, (4) there was insufficient evidence to support a damage award for Castellano's mental anguish under the principles set forth in *Patterson v. PHP Healthcare Co.*,[12] (5) the global jury instruction as to the compensatory and punitive damages was erroneous, and (6) the amount awarded was excessive.

The trial court denied defendants' motions. As to defendants' argument that there was no constitutional cause of action for malicious prosecution, the judge explained that there was no new evidence sufficient to persuade him to alter his prior ruling. Resolving defendants' challenge to their liability for malicious prosecution under the Fourth Amendment,[13] the court determined that it could not overturn

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[12] 90 F.3d 927 (5th Cir. 1996).

[13] The trial court clarified that the issues included within its reasoning for "liability for malicious prosecution" included the sufficiency of evidence as to: (1) Castellano's actual innocence of arson; (2) the existence, *vel non*, of probable cause; and (3) the alleged conspiracy between Fragozo and Sanchez to violate Castellano's constitutional rights.

the jury's verdict because (1) there was sufficient evidence to create an issue of fact as to each element of the crime and (2) the facts and evidence did not point so strongly and overwhelmingly in defendants' favor.

With respect to the jury's award for mental anguish damages, the court stated that under *Patterson*, Castellano's testimony as to his mental anguish, without corroboration, was insufficient to support an award for mental anguish damages. However, the court reasoned that because defendants failed to assert this argument in their Rule 50(a) motion, it was barred from granting their post-trial motions on the issue.[14]

The trial court also denied defendants' motions for a new trial, specifically holding that: (1) the evidence of Castellano's individual damages was not speculative and (2) the damage award was not shocking or inordinately large. The court also noted that because it rejected defendants' challenges to the damage award, its global jury instruction was not erroneous. As to all other issues raised in the motion for a new trial, the court concluded that the verdict was not "against the great weight of the evidence."

II. Discussion

On appeal, defendants Fragozo and Sanchez have raised the following issues for resolution: (1) whether there exists a cause of action for malicious prosecution for purposes of § 1983 under the Fourth Amendment and, if so, whether the trial court erred in concluding that Castellano had met and

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[14] *Citing Allied Bank-West, N.A. v. Stein*, 996 F.2d 111, 114-15 (5th Cir. 1993).

pled the prerequisites for such a cause of action; (2) whether the magistrate judge committed reversible error when he instructed the jury on the basis of Fourteenth Amendment "due process," instead of Fourth Amendment "unreasonable seizure"; and (3) whether there was sufficient evidence before the jury (a) that Castellano had been maliciously prosecuted, (b) of a conspiracy between Sanchez and Fragozo, and (c) that, for qualified immunity purposes, Fragozo's actions were objectively unreasonable.

Defendants have also challenged the damage award on the following fronts: (1) whether the trial court erred in denying their motion for a new trial as to the jury award for mental anguish damages; (2) whether the trial court erred in admitting Trevino's testimony because defendants had not received proper notice of the substance of his testimony before trial or because it was speculative; (3) whether Castellano's complaint included a request for personal damages--derivative from the damages sustained by his business after his conviction; (4) whether the $3,000,000 compensatory damage award or the $500,000 punitive damage award was excessive; (5) whether the trial court erred in instructing the jury globally or in instructing the jury that it could consider "loss of capacity for enjoyment of life"; (6) whether criminal defense attorney fees are recoverable under § 1983 and § 1988; and (7) whether the trial court properly permitted Castellano's criminal defense attorney to testify as to his fees without independent recollection, and relying on fee ledgers not produced upon request.

The court will address each issue in turn.

A. Malicious Prosecution Claim and its Prerequisites Under the Fourth Amendment

In *Albright v. Oliver*,[15] the Supreme Court held that a cause of action for malicious prosecution under the Fourteenth Amendment did not exist. However, the Court did not reach the issue of whether such a right exists under the Fourth Amendment and this circuit interpreted that void as having "left undisturbed our circuit's long-standing recognition of a Fourth Amendment right to be free from malicious prosecution."[16] Thus, this court has acknowledged that it has "long recognized a constitutional right under the Fourth Amendment 'to be free from malicious prosecution.'"[17]

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[15] 510 U.S. 266, 275, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994).

[16] *Kerr*, 171 F.3d at 339.

[17] *Izen v. Catalina*, 256 F.3d 324, 327 (5th Cir. 2001) (*quoting Kerr*, 171 F.3d at 339); *see also Piazza v. Mayne*, 217 F.3d 239, 245 (5th Cir. 2000) (noting that "malicious prosecution implicates rights guaranteed by the Fourth Amendment and is therefore actionable under § 1983"); *Eugene v. Alief Ind. Sch. Dist.*, 65 F.3d 1299, 1305 (5th Cir. 1999) (holding that this right was clearly established as early as 1972)

Defendants point out that there have been some judicial ruminations concerning what conduct is sufficient to prove a cause of action for malicious prosecution under the Fourth Amendment. *See Kerr*, 171 F.3d at 343 (Jones, E., specially concurring) (noting that "the tort of malicious prosecution fits uneasily within the Fourth Amendment" and "to justify a Fourth Amendment malicious prosecution claim . . . one has to extend the period of "seizure" past arraignment").

This court has further clarified that "malicious prosecution may be a constitutional violation . . . only if all of its common law elements are established."[18] Our most recent discussion of the tort of malicious prosecution held that the requirements of the state tort law and the constitutional tort are the same. In *Gordy v. Burns*, this court explained:

> Unquestionably, state-law tort claims -- such as the common-law tort of malicious prosecution -- are not, by themselves, actionable under § 1983. Because § 1983 requires some showing that the plaintiff has been deprived of a federal right, but no constitutional provision specifically guarantees against the institution of groundless criminal prosecutions, a "malicious prosecution" claim under § 1983 is a misnomer.

Nevertheless, the rule in this circuit is that the elements of the state-law tort of malicious prosecution and the elements of the constitutional tort of "Fourth Amendment malicious

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In *Gordy v. Burns*, 294 F.3d 722, 726 (5th Cir. 2002), we made clear that in a claim for malicious prosecution there is no requirement of post-arraignment seizure. Moreover, even if this court were to require independent proof of a violation of the Fourth Amendment in addition to proof of the tort of malicious prosecution, the analysis in this case would not change as Castellano established a violation of his Fourth Amendment rights with proof that he was seized and convicted by virtue of fraudulent evidence fabricated by the defendants--one of whom was a police officer.

[18] *Izen*, 256 F.3d at 328 (*citing Evans v. Ball*, 168 F.3d 856, 862-63 n.9 (5th Cir 1999)).

prosecution" are coextensive. . . . the rule is rooted firmly in Fifth Circuit precedent.[19]

Furthermore, the court noted that:

> [A] plaintiff in a § 1983 malicious prosecution action need establish only the elements of common-law malicious prosecution. This circuit repeatedly has indicated--without explanation--that courts must look to the elements of a malicious prosecution claim under the law of the state where the offense was committed.[20]

Thus, by pleading a claim for malicious prosecution under the Fourth Amendment, a plaintiff pleads an actionable claim under § 1983. The reviewing court need only consider the elements of the tort of malicious prosecution as defined under the law of the relevant state to determine whether a plaintiff has established a claim of malicious prosecution.[21] Therefore, in the case at bar, Castellano was only required to satisfy the criteria for malicious prosecution under Texas law to successfully state a cause of action under § 1983 for a violation of his rights under the Fourth Amendment. Under Texas law, the elements for a cause of action for malicious prosecution are: (1) a criminal action commenced against the plaintiff; (2) the prosecution was caused by the defendants or with their aid; (3) the action terminated in plaintiff's favor; (4) the plaintiff was innocent; (5) the defendants acted without

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[19] *Gordy v. Burns*, 294 F.3d 722, 725 (5th Cir. 2002)(internal citations omitted).

[20] *Id.* at 726.

[21] *Piazza*, 217 F.3d at 245.

probable cause; (6) the defendants acted with malice; and (7) the criminal proceeding damaged the plaintiff.[22]

Accordingly, the trial court did not err in finding that a § 1983 claim for malicious prosecution existed under the Fourth Amendment.

B. Sufficiency of Castellano's Complaint to Assert a Cause of Action Under the Fourth Amendment

We now turn to defendants' allegation that Castellano did not plead a cause of action for malicious prosecution under § 1983 for purposes of the Fourth Amendment. Defendants raised the identical issue in their motion for summary judgment before the trial court--wherein the court treated it as a motion to dismiss for failure to state a claim and determined that Castellano's complaint contained sufficient facts to support his allegation that his Fourth Amendment rights had been violated. We explained in *Bennett v. Pippin*,

> After a trial on the merits, the sufficiency of the allegations in the complaint is irrelevant. . . . When the plaintiff has prevailed after a full trial on the merits, a district court's denial of a Rule 12(b)(6) dismissal becomes moot. The plaintiff has proved, not merely alleged, facts sufficient to support relief.[23]

Based on the rationale in *Bennett* this court will not address this issue.

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[22] *Kerr*, 171 F.3d at 340.

[23] 74 F.3d 578, 585 (5th Cir. 1996).

C. Jury Instructions

Federal Rule of Civil Procedure 51 provides, "no party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."[24] However, this court has never held that a party's failure to object to proposed jury instructions creates a jurisdictional bar to appellate review and has previously entertained tardy jury instruction objections under the plain error standard of review.[25]

Furthermore, in *Tompkins v. Cyr,* this court cautioned that, "in reviewing jury instructions for plain error, we are exceedingly deferential to the trial court" and reiterated the justification behind such deference:

> Few jury charges in cases of complexity will not yield "error" if pored over, long after the fact in the quiet of the library -- if such an enterprise is to be allowed. It is not. The reality is that most such "errors" will be washed away if the trial court is given a fair opportunity to consider them. In short, so long as the trial judge gives counsel a fair opportunity to object, we will listen to unobjected to rulings only in those handful of cases that can meet the exacting requirements of plain error. . . . These rules vindicate

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[24] Fed. R. Civ. P. 51.

[25] *Tompkins v.* Cyr, 202 F.3d 770, 783 (5th Cir. 2000) (*citing* 9 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE § 51.21[2] and *Nero v. Industrial Molding Corp.*, 167 F.3d 921, 931-32 (5th Cir. 1999)).

> powerful interests in orderliness and finality. They also reflect the central role of the United States District Court. If is not a way station or entry gate. Rather, trials are the heart of the system. Trial, not appeal, is the main event.[26]

When the party challenging the district court's instructions has not objected to them before the district court, our consideration of the issue is limited to plain error review and requires proof: "(1) that an error occurred; (2) that the error was plain, which means clear or obvious; (3) the plain error must affect substantial rights; and (4) not correcting the error would 'seriously affect the fairness, integrity, or public reputation of judicial proceedings.'"[27] Further, this court has noted that "an inadequate instruction merits reversal when 'the charge as a whole leaves us with the substantial and ineradicable doubt whether the jury has been properly guided in its deliberations.'"[28] Thus, for this court "to overturn a verdict for plain error in the instructions, we must find an

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[26] 202 F.3d at 784 (5th Cir. 2000) (*citing Highlands Ins. Co. v. Nat'l Union Fire Ins. Co.*, 27 F.3d 1027, 1032 (5th Cir. 1994)).

[27] *Russell v. Plano Bank & Trust*, 1997 U.S. App. LEXIS 39900, 130 F.3d 715, 721 (*citing Highlands Ins. Co.*, 27 F.3d at 1031-32) (*quoting United States v. Olano*, 507 U.S. 725, 736, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993)).

[28] *Turnage v. General Electric Co.*, 953 F.2d 206, 211-12 (5th Cir. 1992) (*quoting Bommarito v. Penrod Drilling Corp.*, 929 F.2d 186, 189 (5th Cir. 1991)); *see also Rubinstein v. Administrators of the Tulane Educational Fund*, 218 F.3d 392, 404 (5th Cir. 2000) (noting that "even if an instruction erroneously states the applicable law or provides insufficient guidance, this Court will not disturb the judgment unless the error could have affected the outcome of the trial").

obviously incorrect statement of law that was 'probably responsible for an incorrect verdict, leading to substantial injustice.'"[29]

Because defendants did not object to the trial court's instructions pertaining to malicious prosecution before they were submitted to the jury, this court will review the instructions for plain error.[30] Clearly, the trial court erroneously instructed the jury that Castellano should prevail if the jury found that defendants violated Castellano's "constitutional right to due process" by maliciously prosecuting him for the criminal offense of arson. Rather, the trial court should have directed the jury that Castellano should prevail only upon a showing that defendants violated Castellano's Fourth Amendment right to be free from "unreasonable seizure." Such an instruction would have been consistent with the court's prior order holding that Castellano could maintain his cause of action for malicious prosecution only under the Fourth or First Amendments--not the Fourteenth Amendment.

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[29] *Tompkins*, 202 F.3d at 784 (*citing Automotive Group v. Central Garage Inc.*, 124 F.3d 720, 730 (5th Cir. 1997)); *Whiting v. Jackson State Univ.*, 616 F.2d 116, 126 (5th Cir. 1980) (noting that failure to object to the jury charge in the trial court precludes review on appeal "unless the error is so fundamental as to result in a miscarriage of justice").

[30] It should be noted that all counsels' proposed jury instructions were submitted prior to the trial court's dismissal of Castellano's malicious prosecution claim under the Fourteenth Amendment. Accordingly, their proposed instructions referred to Castellano's alleged "deprivation of liberty."

However, having reviewed the jury instructions as a whole, this court cannot conceive how using the words "due process," rather than "unreasonable seizure," would have changed the jury's verdict under the facts of this case. Thus, we conclude that the trial court's error was not responsible for an "incorrect verdict, leading to substantial injustice."[31]

The law of this circuit holds that in the event the elements of malicious prosecution are proved, *a fortiori*, a violation of the Fourth Amendment is also proved. In the case at bar, although the judge never mentioned the "Fourteenth Amendment" in its instructions, it erroneously used the words "due process." However, "due process" was defined as the common-law elements of malicious prosecution. Thus, during its deliberations, the jury had before it the appropriate standard required to find a violation of the Fourth Amendment. The jury applied that standard to the overwhelming evidence and found Sanchez and Fragozo liable. It is unlikely that the jury would have reached a different conclusion had the trial court used the words "unreasonable seizure" rather than "due process"--under either wording, the jury had to find that the elements of malicious prosecution were met.

Further, the record clearly shows that the parties, attorneys, court, and jury were keenly aware that if Castellano proved the elements of malicious prosecution, a constitutional right had been violated. Thus, this case hinged on the jury's interpretation of the facts and the credibility of the witnesses as applied to the correct legal standard (the common-law elements of malicious prosecution). The impetus for the jury

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[31] *Tompkins*, 202 F.3d at 784 (*citing Automotive Group v. Central Garage Inc.*, 124 F.3d 720, 730 (5th Cir. 1997)).

verdict was not the improper words "due process," but whether the jury believed that Castellano was arrested, convicted, and sentenced as a result of Sanchez and Fragozo's conspiracy. It is evident that the jury believed that the elements of malicious prosecution were met. The facts drove this case--not the misnomer of the constitutional provision in the jury instructions.[32]

Considering the jury instructions as a whole and applying the great deference that this court owes the trial court in reviewing jury instructions, we find that the trial court's error did not result in an incorrect verdict leading to substantial injustice.

D. Sufficiency of Evidence of Malicious Prosecution under the Fourth Amendment

On appeal, defendants contend that there was insufficient evidence to support several of the elements of malicious prosecution.[33] The only element preserved by defendants in

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[32] Moreover, the jury instruction was not fatally flawed even if proof of illegal seizure were required. *See infra* note 33.

[33] Although it was unnecessary for Castellano to prove that he was "seized" pursuant to the Fourth Amendment to prevail in his § 1983 claim, it is pellucid that Castellano would easily satisfy that requirement because the jury found that he was arrested, convicted, and sentenced on the basis of fraudulent evidence.

Further, the record contains sufficient evidence that Castellano's seizure was "unreasonable." For example, at trial, Castro admitted that "probable cause" to arrest Castellano was established when he received evidence implicating Castellano in the arson including: (1) the audio tape which, while not known to Castro, had been produced and altered by Fragozo and Sanchez and

their pre-verdict JMOL motions, however, was the lack of "probable cause." This court has repeatedly explained that to assert a claim in a Rule 50(b) motion, a party must have raised the issue at the close of the evidence in a Rule 50(a) motion.[34] When a party fails to comply with the Rule 50 procedural requirements, this court employs the "some evidence" standard of review.[35] Therefore, we need only determine whether there was *any* evidence presented at trial as proof of each of the other five elements of malicious

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(2) Sanchez's statement concerning the fire. Under federal law, an "otherwise illegal arrest cannot be insulated from challenge by a decision of the instigating officer to rely on fellow officers to make the arrest." *See Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 568, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971). Thus, the fact that (1) Fragozo, a police officer, knew that the audio tape and portions of Sanchez's statement to Castro implicating Castellano in the arson was fraudulent and (2) Castro relied on such fraudulent evidence in establishing probable cause against Castellano, satisfies the "some evidence" standard that Castellano's arrest was unreasonable.

[34] *See, e.g., U.S. v. Flintco Inc.*, 143 F.3d 955, 960 (5th Cir. 1998); *see also Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1315 (5th Cir. 1995) (explaining that the dual purposes of Rule 50 are: (1) allowing the trial court to re-examine the sufficiency of the evidence as a matter of law if, after verdict, the court must address a motion for judgment as a matter of law and (2) alerting the opposing party to the possible insufficient of his case before being submitted to the jury so that he/she has the opportunity to cure any defects in proof should the motion have merit); *MacArthur v. University of Texas Health Center, at Tyler*, 45 F.3d 890, 897 (5th Cir. 1995).

[35] *Polanco v. City of Austin, Tx.*, 78 F.3d 968, 974 (5th Cir. 1996).

prosecution.[36] Based on our review of the record, there is at least some evidence proving each of those elements.

As noted above, because Sanchez preserved her challenge concerning the existence of "probable cause," this court will review the record to determine whether a reasonable jury could have arrived at the same conclusion the jury rendered.[37]

In the case at bar, the jury was presented with the following evidence: (1) testimony from Joe Hebert that the audio tape Castro received from Sanchez and Fragozo was fabricated, (2) Castellano's unwavering assertion that he was innocent, and (3) Cantu's testimony that Fragozo tried to intimidate him into altering his original story to the police in order to implicate Castellano in the arson. There was sufficient evidence for a reasonable jury to find that Sanchez and Fragozo acted without probable cause. It would be an abuse of this court's discretion to hold otherwise.

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[36] This court will discuss the "damages" element *infra*.

[37] *Powers v. Vista Chemical* Co., 109 F.3d 1089, 1093 (5th Cir. 1997) (*citing Polanco*, 78 F.3d at 974); *Thrash v. State Farm Fire & Casualty Co.*, 992 F.2d 1354, 1356 (5th Cir. 1993) (explaining that "we will reject a verdict in those instances when, 'despite considering all the evidence in the light and with all reasonable inferences' most favorable to the verdict, we find no evidence of 'such quality and weight that reasonable and fair-minded men in the exercise of impartial discretion' could arrive at the same conclusion") (*quoting Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 176 (5th Cir. 1985)).

E. Evidence of a Conspiracy between Sanchez and Fragozo

Defendants posit that there was insufficient evidence of a conspiracy to inculpate Sanchez, --who is not a § 1983 state actor. Because Sanchez properly preserved this issue in a pre-verdict JMOL, the court will review the record to consider whether a reasonable jury could have found that a conspiracy existed.

The elements of civil conspiracy are: (1) an actual violation of a right protected under § 1983, and (2) actions taken in concert by defendants with the specific intent to violate that right.[38] Further, for Sanchez to be liable under § 1983, there had to be proof that she conspired with Fragozo, who was acting under color of law, to violate Castellano's Fourth Amendment rights.[39]

On this issue, the jury was presented with evidence that (1) Fragozo, as police officer, provided the tape recorder so that Sanchez could record her conversations with Castellano; (2) the tape was subsequently altered; (3) upon Fragozo's prompting, Sanchez turned the tape over to Castro; and (4) Sanchez and Fragozo attempted to get Jiminez on "their side" to support their story that Castellano had intentionally burned Fred's No. 7. Having concluded that Castellano's Fourth Amendment rights were violated, we similarly conclude that

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[38] *See Cinel v. Connick*, 15 F.3d 1338, 1343 (5th Cir. 1994).

[39] *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970) ("to act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents") (citation omitted).

there was sufficient evidence before the jury for it to find that a conspiracy existed between Sanchez and Fragozo to deprive Castellano of those rights.

F. Qualified Immunity

In his JMOL motions at the close of Castellano's case and at the close of all the evidence, Fragozo argued that there was insufficient evidence to support the jury's finding that, for purposes of qualified immunity, his actions were not objectively reasonable. However, Fragozo did not raise this issue in his post-verdict motion. Thus, the standard of review to be applied on appeal, whether it be plain error or abuse of discretion, is uncertain. For example in *Gaia Techs., Inc. v. Recycled Prods. Corp.*, we explained that "we have never required a party to file a [post-verdict] Rule 50(b) motion in order to preserve its right to claim insufficiency of the evidence on appeal, so long as it has filed a Rule 50(a) motion at the close of all the evidence."[40] However, in *Colonial Penn. Insur. v. Market Planners Insur. Agency, Inc.*, we held that "in a jury trial, of course, a party must make (and renew at the trial's conclusion) a [post-verdict] a Rule 50(a) [JMOL] motion . . . in order to preserve sufficiency of the evidence for appellate review."[41]

Having reviewed the record, however, this court is satisfied that under either standard there was sufficient evidence for the jury to find that Fragozo's actions were objectively unreasonable for purposes of qualified immunity.

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[40] 175 F.3d 365, 374 n.9 (5th Cir. 1999).

[41] 157 F.3d 1032, 1036 n.3 (5th Cir. 1998).

If the trial court does not resolve the issue of qualified immunity before trial because facts about the official conduct are in dispute, it may be decided by the jury.[42] Thus, in determining whether an individual is entitled to qualified immunity, the jury must determine whether: (1) plaintiff alleged a violation of a clearly established constitutional right[43] and (2) the official's conduct was objectively unreasonable under clearly established law existing at the time of the incident.[44]

In the case at bar, Castellano alleged a violation of his Fourth Amendment right to be free from malicious prosecution. At the time of the events at issue, the protection afforded by the Fourth Amendment to be free from unreasonable seizure was sufficiently clear so that a reasonable official would understand what he [Fragozo] was doing violated the that right.[45] Thus, any reasonable officer would have known that Fragozo's actions in (1) encouraging a witness to fabricate evidence and turn it over to an investigating officer and (2) intimidating another witness, for the purpose of creating probable cause to arrest an innocent individual, were unlawful. Given the above, the jury's

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[42] *Snyder v. Trepagnier*, 142 F.3d 791, 799-800 (5th Cir. 1998).

[43] *Bazan v. Hidalgo County*, 246 F.3d 481, 490 (5th Cir. 2001).

[44] *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

[45] *Wheeler v. Cosden Oil and Chemical Co.*, 734 F.2d 254, 260 (5th Cir. 1984); *Reeves v. City of Jackson*, 608 F.2d 644, 650 (5th Cir. 1979).

determination that Fragozo acted unreasonably, and thereby was not entitled to qualified immunity, is supported by sufficient evidence.

G. Damages

Having found the defendants liable, the jury awarded Castellano $3,000,000 in compensatory damages and $500,000 in punitive damages. We now turn our consideration to defendants' objections to the damage award.

1. Castellano's Mental Anguish Damages

In *Patterson v. P.H.P. Healthcare Co.*,[46] this court explained that in the context of a Title VII case, a plaintiff's testimony that he felt "frustrated" and "real bad" for being judged by the color of his skin and that his work environment was "unbearable" was insufficient to support anything more than a nominal damage award for emotional harm, absent corroborating testimony or expert medical or psychological evidence of damages caused by the alleged distress. This court has held that the testimony of a plaintiff, alone, can be sufficient to support an award of mental damages when it is particularized and extensive.[47] However, because neither

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[46] 90 F.3d 927 (5th Cir. 1996).

[47] *See e.g.*, *Oden v. Oktibbeha County Mississippi*, 246 F.3d 458, 470-71 (5th Cir. 2001) (upholding jury award of $20,000 in compensatory damages for mental anguish when the only evidence submitted by plaintiff was his own testimony that as a result of defendants' discrimination, he experienced stress, sleeplessness, betrayal, and shame); *Williams v. Trader Pub. Co.*, 218 F.3d 481, 486-87 (5th Cir. 2000) (upholding an award of $100,000 in compensatory damages for emotional distress premised solely on

defendant raised this issue in their Rule 50(a) motion, the court refused to "consider the issue" in the post verdict motions.

On appeal, defendants contend that the trial court abused its discretion in denying their motion for judgment as a matter of law or, in the alternative, a new trial as to Castellano's mental anguish damage award because there was insufficient evidence on which the jury could base such an award under *Patterson* and its progeny.

As alluded to above, the standard of review employed to analyze a trial court's denial of a judgment as a matter of law depends on whether the party complied with Rule 50(a).[48] When a party has properly moved for judgment as a matter of law at the conclusion of the evidence, this court reviews the record to determine the sufficiency of the evidence.[49] However, when a party has not properly moved for a judgment as a matter of law, this court reviews the record

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Williams' testimony regarding her "severe emotional distress," sleep loss," severe loss of weight" and "beginning smoking"); *Forsyth v. City of Dallas*, 91 F.3d 769 (5th Cir. 1996) (upholding jury verdict awarding two plaintiffs $100,000 and $75,000 respectively in emotional anguish damages based on their testimony that they suffered weight loss, depression, intestinal troubles, marital problems, and sleeplessness after they were demoted within the police force for making allegations of illegal wiretapping within the police department).

[48] *Polanco*, 78 F.3d at 973-74.

[49] *Id.* at 974 (noting that "the standard for evaluating the sufficiency of evidence is whether the evidence has such quality that reasonable and fair-minded persons would reach the same conclusion").

only to determine whether the record contains *any* evidence to support the trial judge's decision.[50]

This court has never demanded a "slavish" adherence to the Rule 50 "procedural sequence." However, in cases in which we have strayed from its proscriptions, the divergence has been "de minimus" and the purposes of the rule, enabling the trial court to re-examine the sufficiency of the evidence as a matter of law and alerting the opposing party to the insufficiency of his case before being submitted to the jury, were accomplished.[51]

The facts of this case do not warrant an exception to Rule 50. Neither the trial court nor opposing counsel had any indication that defendants intended to challenge Castellano's account of his mental anguish damages because they raised no objection during Castellano's testimony, voiced no concern as to the sufficiency of the evidence during the jury charge, and did not mention this argument at the close of the case. Thus, we will review the record to determine whether there is *any* evidence of mental anguish to support the jury's damage award.

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[50] *Crawford v. Falcon Drilling Co.*, 131 F.3d 1120, 1133 (5th Cir. 1997) (noting that "we must keep in mind 'this court's long-standing rule that reversal for plain error is 'not a run-of-the-mill remedy' and will occur only in exceptional circumstances to avoid a miscarriage of justice'") (*quoting Highlands*, 27 F.3d at 1032).

[51] *See for example* the court's reasoning in *U.S. v. Flintco*, 143 F.3d 955 (5th Cir. 1998) (refusing to exempt party from Rule 50 because defendant did not move for judgment as a matter of law at close of plaintiff's case or at the close of all the evidence and did not challenge sufficiency of evidence as a basis for objecting to the court's jury instruction).

Having reviewed the record, the court is satisfied that there is some evidence of Castellano's mental anguish damages and will not disturb the jury verdict. During the trial, the jury learned that Castellano has dealt, for fifteen years, with the stigma of being convicted of an arson he did not commit in a community where he was once a prominent citizen. Castellano explained that since his conviction, his reputation has been ruined:[52]

> People--in a situation like this, people don't forget, and they still think you're guilty, even though you're not. You can explain to them all you want that it's been expunged, I'm not guilty, it was a frame up. Tell them everything you want. But they still have it in their mind that you may be guilty.[53]

Further, Castellano stated that he was required to resign from his civil service position after his arrest--and was not reinstated after his record was expunged. He also explained that since his conviction, he has been unable to obtain fire insurance or financing for his business.

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[52] *See Marrero v. City of Hialeah*, 625 F.2d 499, 514 & n.19 (5th Cir. 1980) (holding that "to the extent unconstitutional conduct caused injury to appellants' personal or business reputations, the injury is compensable as an element of damages" and explaining that "since the fourth amendment protects some of our most cherished rights, and the injury to reputation flowing from the violation of those rights may be devastating, we have no doubt that a principle of fair compensation requires that injury to reputation caused by a violation of fourth amendment rights be compensable").

[53] Tr. at 223.

Castellano also described the details of his arrest and stated after he was taken from his business, he was forced to remain in handcuffs at the police station for a little over an hour at which point he heard Castro ask another officer whether "los animales ya legaron"(have the animals arrived).[54] He stated that by "animales" Castro was referring to the press and explained that he was held in a back room until the press arrived. Thereafter, Castellano was paraded slowly before the press--in handcuffs. According to Castellano, the details of his case were intermittently reported as the lead story on the front page of the newspaper for over a year.

Castellano's testimony was particularized, extensive, and compelling. Thus, under the plain error standard, the existence of evidence of Castellano's mental anguish constrains this court from reversing the decision of the trial court.[55]

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[54] Tr. at 212.

[55] The court also notes that the jury heard testimony that the damages Castellano personally suffered as a result of damages to his business were approximately $1,200,000. Therefore, we assume that the $3,000,000 compensatory damage award included Castellano's personal economic losses.

2. Trial Court's Decision to Allow the Jury to Compensate Castellano's Personal Damages Derivative from Damages Sustained by his Corporation

This court reviews a trial court's evidentiary rulings for an abuse of discretion.[56]

Defendants first contend that under Federal Rule of Civil Procedure 9(g), Castellano's request for damages to compensate his individual losses derivative from his business, including lost wages in the form of executive compensation, should have been pled with specificity as a form of "special damages."[57] Further, they argue that through his complaint Castellano only requested damages to compensate the corporation for its losses stemming from its inability to franchise--*not* for damages Castellano allegedly suffered *personally*. Thus, defendants urge this court to find that the trial court abused its discretion by overruling their objections to the jury's consideration of such damages.

The Federal Rules of Civil Procedure require notice pleading[58] and defendants cite no Fifth Circuit jurisprudence

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[56] *In re Air Crash Disaster*, 795 F.2d 1230, 1232 (5th Cir. 1986).

[57] Defendants cite no Fifth Circuit law in support of this contention and instead rely on jurisprudence from the Seventh and Eighth Circuits.

[58] *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 434 (5th Cir. 2000); 5 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 1216 at 151-52 (*citing Continental Collieries, Inc. v. Shober*, 130 F.2d 631, 635

to support their position that loss of earning potential must be pled with specificity. Castellano's third amended complaint prayed for damages, in part, to compensate him for any impairment to his social and mercantile standing--which arguably includes the loss of earning potential. Defendants were also aware that after his arson conviction Castellano was unable to franchise his restaurant and, under the notice pleading standard, defendants should have been aware that, as the sole owner of the restaurant, Castellano would seek any damages he suffered derivative from his business losses. Additionally, these losses were mentioned in Castellano's expert report. We find defendants' argument that they were unaware that Castellano would be seeking damages to compensate his personal loss stemming from the economic damage to his corporation to be unpersuasive. Thus, we conclude that the trial court did not abuse its discretion in admitting evidence of Castellano's lost wages in the form of executive compensation.

3. Notice of Trevino's Testimony as to Castellano's Individual Damages

This court employs an abuse of discretion standard when reviewing a trial court's decision on the admissibility of expert testimony.[59]

(3rd Cir. 1942)) (noting that under Federal Rule of Civil Procedure 8, a complaint is required to afford "fair notice to the adversary of the nature and basis of the claim asserted and a general indication of the type of litigation involved").

[59] *Jon-T Chems., Inc. v. Freeport Chem. Co.*, 704 F.2d 1412, 1417 (5th Cir. 1983).

Defendants argued at trial that they were unaware that there would be expert testimony as to Castellano's individual damages derivative from his inability to franchise his business--including lost wages in the form of executive compensation. The trial court disagreed and allowed Trevino to testify as to "the damages Castellano sustained personally as a result of this malicious prosecution, such as loss of income to him as a result of being unable to franchise Fred's Fish Fry."

However, defendants knew that Trevino would be called as an expert witness for Castellano because he was identified as such in all pre-trial material. Further, in the report prepared before trial and served on defendants, Trevino specifically addressed the economic damages sustained by Castellano, including his lost executive compensation. Had defendants opted to depose Trevino before trial, they could have thoroughly explored the details of his report. Thus, the trial court did not abuse its discretion in determining that, because estimates of Castellano's future compensation were included in his expert report, defendants were not unfairly surprised by Trevino's testimony as to Castellano's personal damages derivative from the failure to franchise Fred's.

4. Speculative Testimony

It is defendants' position that the trial court also erred in admitting Trevino's testimony as to Castellano's individual damages, including the loss of executive compensation, because it was purely speculative and premised on the assumption that Castellano's franchise would have been profitable.

While we have held that "damages will not be awarded for lost profits that are merely speculative in nature," we have

tempered that rule explaining that, " it is not necessary that recovery for future profits should be established by exact calculation, as it is enough to have data from which these profits may be ascertained with a reasonable degree of certainty and exactness."[60]

Having reviewed the record, this court finds that Trevino's testimony as to Castellano's individual damages was not speculative. Rather, Trevino formed and presented a competent opinion regarding Castellano's individual lost profits, after the fire, with reasonable certainty by relying on his review of objective historical data, including: (1) Fred's past economic figures and success as a restaurant before the fire, (2) the successes of other similar restaurants, and (3) other reference sources. Based on the above, this court concurs with the trial court's determination that "Trevino was able to ascertain a competent opinion regarding lost profits with reasonable certainty and without speculation."

5. Punitive Damage Award

In reviewing an award of punitive damages, the focus of the reviewing court is to ensure that, under the circumstances

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[60] *DSC Communs. Corp. v. Next Level Communs.*, 107 F.3d 322, 329 (5th Cir. 1997) (*quoting Fiberlok, Inc. v. LMS Enters.*, 976 F.2d 958, 962 (5th Cir. 1992)) (internal citations omitted); *Hiller v. Mfrs. Prod. Research Group of North America*, 59 F.3d 1514, 1520 (5th Cir. 1995) (*quoting* the Texas Supreme Court for the proposition that "the requirement of 'reasonable certainty' in the proof of lost profits is intended to be flexible enough to accommodate the myriad circumstances in which claims for lost profits arise. . .whether in a given case they should be so classified depends altogether upon the facts and circumstances of that particular case").

of the case in question, the award is not grossly excessive or unreasonable.[61] To make that determination, the court should consider the following factors: (1) the degree of defendant's reprehensibility or culpability, (2) the ratio between the compensatory and punitive damages;[62] and (3) the possible criminal and civil sanctions for comparable misconduct.[63]

In the case at bar, the jury found that defendants conspired to have Castellano falsely charged and convicted of arson--an insidious crime that loomed over him for years--by fabricating evidence. Such conduct is pusillanimous and unquestionably reprehensible. Further, considering the emotional and monetary harm Castellano suffered and will continue to endure through his life, the court finds that there is a reasonable relationship between the punitive damage award and the harm caused by defendants' conduct. Finally, under Texas law, tampering with or fabricating physical evidence

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[61] *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1382 (5th Cir. 1991).

[62] *BMW of North America v. Gore*, 517 U.S. 559, 580, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) (explaining that the proper inquiry is whether there is a reasonable relationship between the punitive damage award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred).

[63] *Cooper Indus. Inc. v. Leatherman Tool Group Inc.*, 532 U.S. 424, 435, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001); *BMW 517 U.S. at 575; Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20-21, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991) (noting that "appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition"); *Eichenseer*, 934 F.2d at 1382.

constitutes a third degree felony.[64] Therefore, the criminal and civil sanctions that could be imposed for comparable misconduct under state law are considerable and lead this court to conclude that the punitive damage award was not excessive.

6. Loss of Capacity for Enjoyment of Life and Global Damages Verdict Form

Defendants cite *Dugas v. Kansas City Southern. Ry. Lines*[65] for their position that the trial court erred in allowing the jury to consider "loss of enjoyment of life" as an element of Castellano's damages. In *Dugas*, this court held that in a case involving the Federal Employer's Liability Act, the trial court had erroneously instructed the jury as to damages because it had *repeatedly* stressed "loss of enjoyment of life" and "loss of vitality" as if they were separate and independent items of damages. However, in the case at bar, the trial court correctly explained that the jury was to consider "loss of enjoyment of life" as one of several factors in determining an appropriate compensatory damage award for Castellano. Accordingly, it was not an abuse of discretion for the trial court to deny defendants' motion for a new trial on this issue.

Defendants rely on this court's holding in *In re Air Crash Disaster*[66] for their argument that the trial court erred in submitting a global damage jury verdict form. Defendants argument is misguided and the rationale employed in *In re Air Crash Disaster* is distinguishable from the case at bar. In that

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[64] Tex. Penal Code § 37.09

[65] 473 F.2d 821, 827 (5th Cir. 1973).

[66] 795 F.2d 1230 (5th Cir. 1986).

case, we held that the use of a global rather than specific interrogatories on the issue of damages in a wrongful death action required a new trial on the element of damages comprising the general award once it was determined that the total award exceeded the maximum recovery rule. In this case, however, there is no basis for this court to remit the damage award and because the amount awarded does implicate the maximum recovery rule, the trial court's global damages interrogatory was not in error.[67]

7. Attorneys Fees Under § 1983 and § 1988

Defendants contend that the trial court erred in awarding Castellano criminal defense attorneys' fees accrued during his criminal trial because 42 U.S.C. § 1988(b) only permits the recovery of attorney fees in "actions or proceedings to enforce the provisions of § 1983."

While this court has yet to rule upon this issue, several circuits have reasoned that a plaintiff who is successful in a malicious prosecution claim should be reimbursed for the attorney's fees expended during the original criminal proceeding. In *Kerr v. City of Chicago*, the court reasoned:

> The defendants also contend that attorneys' fees expended in a criminal action are not recoverable in a civil rights action. We disagree. In *Basista v. Weir*, 340 F.2d 74, 85-86 (3d Cir. 1965), the court held that federal common law controls the question of damages in civil rights actions with the purpose being to

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[67] We also note that under Federal Rule of Civil Procedure 49(b), the trial court is given the discretion to submit a general verdict form.

> vindicate the civil rights of the individual. A plaintiff in a civil rights action should be allowed to recover the attorneys' fees in a state criminal action where the expenditure is a *foreseeable result* of the acts of the defendant.[68]

Similarly, in *Borunda v. Richmond,*[69] the Ninth Circuit held that plaintiffs in a § 1983 civil rights suit, brought after they were wrongly arrested in violation of the Fourth Amendment, were entitled to recover attorneys' fees incurred in their defense of state court criminal charges. The court explained:

> Here, the attorneys' fees arose out of the necessity of defending against allegedly unwarranted criminal charges and were presented to the trier of fact as an item of damage.

A plaintiff who establishes liability for deprivations of constitutional rights actionable under 42 U.S.C. § 1983 is entitled to recover compensatory damages for all injuries suffered as a consequence of those deprivations. . . . The victim of the constitutional deprivation is entitled to compensation for economic harm, pain and suffering, and mental and emotional distress that results from the violations.

The [plaintiffs'] expenditures for legal representation during the prior criminal proceeding most assuredly constitute economic harm. The reasonable amount of these expenditures, if proved to the jury's satisfaction to be the consequence of

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[68] 424 F.2d 1134, 1141 (7th Cir. 1970).

[69] 885 F.2d 1384, 1389-91(9th Cir. 1989).

appellants' illegal conduct, is recoverable as compensatory damages.

The amount of attorney's fees incurred during the criminal prosecutions was a direct and foreseeable consequence of appellants unlawful conduct.[70]

Finally, in *Greer v. Holt,* the Sixth Circuit declined to award attorneys' fees incurred in an underlying prosecution where the plaintiff sued police under § 1983, *but* clarified that it, "expressed no opinion as to whether the client could recover attorneys' fees as part of a damage package as, for example, in a malicious prosecution suit."[71]

The plain language of § 1988 allows a prevailing plaintiff to recover costs expended to enforce the provisions of § 1983 [72] and such a recovery is warranted in this case. Castellano was the "prevailing plaintiff" and successfully proved that defendants conspired to violate his Fourth Amendment rights. Furthermore, in order to satisfy the elements of malicious prosecution in his § 1983 action, Castellano *had* to prevail in his underlying criminal proceeding. Thus, his attorneys' fees were expended as a necessary prerequisite of his action to "enforce" the protections of § 1983.

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[70] *Id.* at 1389-90.

[71] 718 F.2d 206, 207, n.1 (6th Cir. 1983).

[72] *Raley v. Fraser*, 747 F.2d 287, 290 (5th Cir. 1984) (noting that the language of § 1988 unambiguously provides that in an action to enforce § 1983, the court, "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs") (*quoting* 42 U.S.C. § 1988).

Further, and adopting the rationale of *Kerr* and *Borunda*, Castellano's expenditure of attorneys' fees to defend himself in his criminal trial was, *unquestionably,* a foreseeable result of defendants' actions. Had defendants not conspired to fabricate evidence to implicate Castellano in the arson, in violation of his Fourth Amendment rights, he would not have been arrested and prosecuted for the crime. Thus, this court holds that the trial court did not abuse its discretion in allowing Castellano to recover the attorneys' fees he incurred during his criminal trial.

8. Testimony of Castellano's Criminal Defense Attorney

Defendants contend that the trial court erred in allowing Castellano's criminal defense attorney to testify as to his fees from a ledger, which had not been disclosed to them, because he could not recall the specific fees charged therein. On that basis, defendants argue that the damage award should be reversed and remanded for a new trial on damages.

This court reviews evidentiary rulings made over a party's objections for abuse of discretion and harmless error.[73] At trial, Castellano's attorney pointed out that Castellano's claim for attorney fees expended during his criminal trial was no surprise to defendants because it was listed as an element of damages in each pre-trial order prepared for trial. It is a well-settled rule that a joint pre-trial order, signed by both parties, governs the issues and evidence presented at trial.[74] Thus,

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[73] *Tompkins*, 202 F.3d at 779.

[74] *Branch-Hines v. Hebert*, 939 F.2d 1311, 1319 (5th Cir. 1991); *Hall v. State Farm & Cas. Co.*, 937 F.2d 210, 212 (5th Cir. 1991); *Flannery v. Carroll*, 676 F.2d 126, 129 (5th Cir. 1982).

defendants were on notice that Castellano was seeking attorneys' fees from his criminal trial and the trial court did not abuse his discretion in allowing the criminal defense attorney to refresh his recollection as to the exact amount of those fees.[75]

For all these reasons, we affirm the judgment of the trial court.

AFFIRMED.

RHESA HAWKINS BARKSDALE, Circuit Judge, dissenting:

As stated recently in ***Gordy v. Burns***, 294 F.3d 722, 725 (5th Cir. 2002) (emphasis added): "It would be an understatement to say that [our] circuit's caselaw regarding *so-called* 'Fourth Amendment malicious prosecution' claims under § 1983 is both *confused and confusing*". (Emphasis added.) As evidenced by the majority opinion in this case, the confusion continues to expand. It is past time to correct our course.

Therefore, I must respectfully dissent from the majority's holding that, in order to state a claim under § 1983 for a violation of his rights under the Fourth Amendment for malicious prosecution, Castellano was only required to satisfy the criteria for malicious prosecution under Texas law (§ 1983 malicious prosecution claim). In addition, notwithstanding the confused state of our circuit precedent in this area, I also must respectfully dissent from the majority's holding that the district court did not commit reversible error when, for

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[75] *See* Fed. R. Evid. 803(5).

Castellano's § 1983 malicious prosecution claim, it instructed the jury on the basis of Fourteenth Amendment "due process", rather than Fourth Amendment "unreasonable seizure", especially in the light of its having previously held the Fourth, not the Fourteenth, Amendment was the constitutional basis for Castellano's pursuing the claim. Therefore, I do not reach the issues concerning sufficiency of the evidence, damages, and attorney's fees.

For the reasons stated in ***Gordy*** and discussed at length *infra*, en banc review is required to clarify § 1983 malicious prosecution claims in this circuit. I urge such review; further, I would vacate the judgment and remand for further proceedings.

I.

For purposes of the issues addressed in this dissent, a statement of the relevant underlying facts and district court rulings is necessary.

Castellano owns Fred's Fish Fry (Fred's), a fast-food restaurant chain in San Antonio, Texas. Sanchez was the Fred's area manager at the time of the incident giving rise to this case: a fire on 31 October 1984 that destroyed Fred's Store Number 7 (No. 7). Sanchez was fired two days after the fire.

Fragozo, a San Antonio police officer, held an off-duty job as a Fred's security guard for approximately one year, ending in the spring of 1984, prior to the October fire. According to Castellano, Fragozo quit his Fred's job after Castellano, then Chairman of San Antonio's Fire and Police Civil Service Commission, refused to provide Fragozo a copy

of the police department's examination for promotion to lieutenant.

Castellano denied ever expressing an intent to burn No. 7. Sanchez testified that he did. According to Sanchez: on or about 19 October 1984, Castellano began talking about intentionally burning No. 7; he first mentioned such a plan in response to Sanchez's noting how slow business had been at No. 7; Castellano indicated he could collect $85,000 in insurance proceeds (he had recently increased No. 7's coverage from approximately $50,000 to $85,000); on several other occasions between 19 and 26 October, Castellano spoke about the scheme, indicating he might execute it on 29 or 31 October; and he even elicited Sanchez's help, by instructing her to tell employees, every time she visited No. 7, that she smelled gas.

Sanchez relayed the content of the alleged conversations to Fragozo. In response, he gave Sanchez a voice-activated tape recorder he had purchased, so that Sanchez might tape any additional telephone conversations concerning a fire in No. 7. Fragozo and Sanchez testified that the purpose of recording such conversations was to protect Sanchez from any liability if arson were attempted.

On or about 29 October, an issue arose concerning missing deposits in the bank account for Fred's. Castellano confronted Sanchez about the discrepancy and requested that she undergo a polygraph test. Sanchez refused.

Also on 29 October (according to Sanchez), Castellano instructed her to purchase Halloween items for the restaurants. Sanchez testified Castellano specifically wanted a candle in No. 7. That evening, Sanchez began recording telephone conversations with Castellano. She made recordings

on 29 and 30 October. While the recordings are occasionally unintelligible or pick up only one end of the conversations, they contain potentially inculpatory statements by a voice alleged to be Castellano's. Among other topics, the statements regard fire insurance and stoves being left on in No. 7. According to Sanchez, one of the 30 October recordings included an admission by Castellano of a failed arson attempt on the evening of 29 October.

The recordings, however, contain no outright admissions. And, at trial, Castellano denied the voice at various spots on the recordings was his. Additionally, an expert witness for Castellano testified as to numerous junctures and inconsistencies on the tapes.

Sanchez testified about another admission by Castellano, made in person on 31 October, about a second failed attempt on 30 October. But, Castellano denied ever attempting arson or admitting to any such attempt.

On the evening of 31 October, No. 7 was destroyed by fire. Alfred Castro, a San Antonio arson investigator (and former defendant in this action), was assigned to investigate the fire that night. After surveying the scene, but before he knew who owned the building, Castro concluded the fire resulted from arson. Physical evidence included jars of gasoline, a disconnected natural gas line from No. 7's water heater, and two wrenches.

Castro met Castellano at the scene during the early hours of 1 November and learned he was the owner. Castro asked Castellano whether the building was insured. According to Castro, Castellano indicated he was not certain but then stated he believed it was insured for $55,000. When Castro left the scene that morning, he had also concluded the fire was an

inside arson job. At that point, however, he had no information to link Castellano to the fire.

Later on the morning of 1 November, Sanchez went to the fire scene. According to Sanchez: Castro had called her earlier and informed her No. 7 had burned down "with four gallons of gasoline"; while at the scene, she was paged and told to meet Castellano about a block away; she did so; and Castellano instructed her to tell No. 7's manager that, if the police "asked [the manager] about the steel bar in the back door of the building, just for her to say that she don't [sic] remember if she left it on [the door] or not the night before".

Sanchez returned to the scene. Castro also did so that morning, where he interviewed Sanchez for the first time. She provided him the names of all employees at No. 7.

Among the employees interviewed was Luis Cantu, a longtime friend of Fragozo and longtime employee of Castellano. Cantu would later testify about an incident occurring shortly *after* the fire: Fragozo and Castro drove to his house; brought him to Fragozo's car; and attempted to persuade him -- allegedly while intimidating him with a weapon -- to alter a statement he had provided to authorities concerning the fire.

On or about 2 November, Fragozo contacted Lieutenant Trevino of San Antonio's Arson Department, informing him of an anonymous witness with information about two previous attempts to burn No. 7. Castro met with Fragozo on 6 November. Fragozo confirmed there was an informant, and stated he would try to persuade the informant to come forward. The next day, Castro and Fragozo met again; Fragozo revealed Sanchez's identity and the recorded conversations.

That afternoon (7 November), Castro met with Sanchez, who had been fired by Castellano on 2 November. (According to Castellano, she was fired for her earlier referenced refusal to submit to the polygraph test regarding the missing deposits.) Sanchez, who had been prompted several times by Fragozo to release the recorded conversations, provided the tape to Castro and agreed to make a written statement that evening. In it, she discussed, among other things, her telephone conversations with Castellano and his alleged prior arson attempts.

After taking the statement from Sanchez, Castro concluded he had probable cause to believe Castellano was responsible for the fire. With the evidence he had gathered, Castro contacted the District Attorney, who prepared an affidavit. Both the District Attorney and Castro signed it; and Castro presented it to a magistrate, who issued an arrest warrant.

Castro executed the warrant at Castellano's office. Castro and a partner escorted Castellano to their patrol car, searched him, and took him to the police station. There, Castro booked and fingerprinted Castellano, before escorting him to the jail. Castellano was apparently released on bail shortly thereafter. The entire episode lasted a few hours.

An examining trial was held, at which Castro and Sanchez, but not Fragozo, testified. The judge found probable cause. The case was then presented to a grand jury, which indicted Castellano.

Castellano was convicted in Texas state court of arson and sentenced to five years probation. But, on his third state habeas application, the Texas Court of Criminal Appeals set aside the conviction and remanded to the trial court. ***Ex Parte Castellano*** , 863 S.W.2d 476 (Tex. Crim. App. 1993).

Apart from Castellano, the only witness at the habeas hearing had been one of his employees, Clemencia Jiminez, who testified that: Sanchez had told her of a plan to falsely accuse Castellano; and Sanchez and Fragozo had attempted to enlist her in that plan. In setting aside the conviction, the Court of Criminal Appeals accepted the habeas judge's factual finding that Fragozo and Sanchez had perjured themselves during the criminal trial. *E.g.*, ***id.*** at 481.

Subsequently, the District Attorney's office dismissed the case. In this § 1983 malicious prosecution action that followed, the district court took judicial notice of the criminal case having been "dismissed for lack of sufficient evidence". On the other hand, it granted a motion *in limine*, prohibiting reference to specific findings about Castellano's habeas relief.

In 1994, Castellano filed this action in Texas state court as a common-law tort action. In addition to Fragozo, Sanchez, and Castro, Castellano sued others, including the City of San Antonio. After § 1983 claims were added in early 1996, this action was removed to federal court. Castellano filed a second amended complaint; *the district court interpreted it as premised entirely on a claim under § 1983 for malicious prosecution (§ 1983 malicious prosecution claim) and ruled the action would proceed solely on that basis*. Castellano filed a third amended complaint in late 1996.

The action was referred to a magistrate judge in early 1998. At that time, the only remaining defendants were Fragozo, Sanchez, Castro, and the City. Sanchez promptly moved for summary judgment, contending, *inter alia*: that Castellano presented a § 1983 malicious prosecution claim premised solely on Fourteenth Amendment substantive due process violations, but that ***Albright v. Oliver***, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994), discussed

extensively *infra*, had limited the availability of the claim to Fourth Amendment violations. (Of course, the Fourth Amendment is made applicable to state actors through the Fourteenth Amendment. References, however, in this dissent to the Fourteenth Amendment are to substantive due process.)

Sanchez's summary judgment motion was granted in part and denied in part, the court ruling: *Castellano could not base his claim on the Fourteenth Amendment*; Castellano had based his claim, in part, on the Fourth Amendment, the constitutional basis for a § 1983 malicious prosecution claim; and his third amended complaint contained allegations supporting a Fourth Amendment violation. Trial was held more than two years later, in April 2000. At the close of Castellano's evidence, defendants moved under Federal Rule of Civil Procedure 50(a) for judgment as a matter of law (JMOL), asserting, *inter alia*: there is no basis, as a matter of law, for a § 1983 malicious prosecution claim; and, alternatively, *as the district court had held in its summary judgment ruling*, the claim exists only for Fourth Amendment violations and, consequently, Castellano's claim could survive only to the point of arrest. The district court denied the JMOL motions by Fragozo, Sanchez, and Castro but granted that by the City, finding no evidence of a municipal policy or custom.

Fragozo, Sanchez, and Castro, the three remaining defendants, renewed their JMOL motions at the close of all the evidence. The motions were again denied.

As discussed *infra*, the magistrate judge instructed the jury not in terms of a Fourth Amendment violation, but in terms of a "constitutional right to due process". He instructed that, to hold the defendants liable, the jury had to find, *inter alia*, that they had "intentionally committed acts that deprived [Castellano] of due process". (It was stipulated that, as

required for § 1983 liability, Fragozo and Castro had acted under "color of state law".)

In answers to interrogatories, the jury found: Fragozo, *but not Castro*, while acting under color of law, "deprived Castellano of his *constitutional rights* by committing malicious prosecution" (emphasis added); and Sanchez conspired with Fragozo, while he was acting under color of law, "with specific intent to deprive Castellano of his *constitutional rights*" (emphasis added). Damages had been submitted to the jury globally; it returned compensatory damages of $3 million, with $1.5 million attributed each to Fragozo and Sanchez. Additionally, finding Fragozo and Sanchez had acted with malice, willfulness, or callous and reckless indifference, the jury awarded $ 500,000 in punitive damages -- $250,000 each against Fragozo and Sanchez. Judgment was entered in mid-April 2000.

Fragozo and Sanchez moved for JMOL or, in the alternative, for a new trial. They again asserted, *inter alia*: there is no basis, as a matter of law, for a § 1983 malicious prosecution claim, or at least not one premised on Fourteenth Amendment due process violations, which, according to them, were the violations Castellano had alleged. In rejecting that assertion and denying the motions, the magistrate judge referenced his earlier summary judgment order. *That order, however, had held Castellano's claim survived only on Fourth -- not Fourteenth -- Amendment grounds*.

II.

Fragozo and Sanchez raise numerous issues touching every aspect of the trial. As noted, this dissent addresses only two: the confused (in fact, erroneous) precedent in our circuit

allowing a § 1983 malicious prosecution claim; and the concomitant reversible error in the jury instructions.

Appellants' primary points concern our limited jurisdiction in our federal system. What rights cognizable in federal court were violated; what damages flow from them? In essence, Castellano seeks recovery for the common-law tort of malicious prosecution; but, *for his own reasons*, he has pressed it under § 1983. (One reason given by Castellano at oral argument on appeal was his concern that, for a state-law malicious prosecution, Fragozo would have immunity under state law, leaving Sanchez as the only defendant.)

Our circuit precedent permits such a claim in some form. But, the understandable confusion, as noted in ***Gordy***, over the bases for such a claim dressed in § 1983 garb, discussed in detail *infra*, may have been the reason for reversible error arising out of the jury instructions about it. In any event, this case should be reviewed *en banc* in order to clarify the elements of, and permissible damages for, a § 1983 malicious prosecution claim.

Toward that end, an extensive analysis of the relevant precedent follows. In this regard, for decisions subsequent to the earlier noted ***Albright v. Oliver***, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994), my research reveals only one by this court where, as here, the malicious prosecution plaintiff prevailed on the merits in district court (***Gordy***; judgment vacated). It appears that there has not been one decision in which damages of the size at issue here were awarded. Instead, our post-***Albright*** precedent primarily concerns qualified immunity for § 1983 malicious prosecution claims.

A.

Section 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities *secured by the Constitution and laws*, shall be liable to the party injured in an action at law ... for redress...

42 U.S.C. § 1983 (emphasis added).

"The first inquiry in any § 1983 suit ... is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'" ***Baker v. McCollan***, 443 U.S. 137, 140, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979) (*quoting* 42 U.S.C. § 1983). Obviously, "not every common law tort committed by state or local government officials is actionable under § 1983". ***Brummett v. Camble***, 946 F.2d 1178, 1183 (5th Cir. 1991), *cert. denied sub nom.* 504 U.S. 965, 112 S. Ct. 2323, 119 L. Ed. 2d 241 (1992).

Common-law malicious prosecution concerns "the groundless institution of criminal proceedings against the plaintiff". ***Nesmith v. Alford***, 318 F.2d 110, 118 (5th Cir.) (*quoting* WILLIAM L. PROSSER, TORTS § 12 (2d ed. 1955)), *cert. denied sub nom.* 375 U.S. 975, 84 S. Ct. 489, 11 L. Ed. 2d 420 (1963). The tort "involves a delicate balance between society's interest in the efficient enforcement of the criminal law and the individual's interest in freedom from unjustifiable and oppressive criminal prosecution". ***Richey v. Brookshire Grocery Co.***, 952 S.W.2d 515, 517, 40 Tex. Sup. Ct. J. 839 (Tex. 1997). Its elements under Texas

law -- relevant to this action and consistent with the law of other States -- are:

> (1) a criminal prosecution was commenced against the plaintiff; (2) *the prosecution was initiated or procured by the defendant*; (3) the prosecution terminated in favor of the plaintiff; (4) the plaintiff was innocent; (5) *the defendant lacked probable cause to instigate the prosecution*; (6) the defendant acted with malice in bringing about the prosecution; and (7) the plaintiff suffered damages as a result of the prosecution.

Rodriguez v. Wal-Mart Stores, Inc., 52 S.W.3d 814, 820 (Tex. App. -- San Antonio 2001) (emphasis added); ***Thrift v. Hubbard***, 974 S.W.2d 70 (Tex. App. -- San Antonio 1998, *review denied*); *see also* ***Richey***, 952 S.W.2d at 516; ***Browning-Ferris Indus., Inc. v. Lieck***, 881 S.W.2d 288, 292-93, 37 Tex. Sup. Ct. J. 851 (Tex. 1994).

While related to other common-law torts, especially abuse of process, malicious prosecution is distinguished by its focus on the institution -- or, in Texas common-law terms, "initiation" or "procurement" -- of criminal proceedings. Whereas the essence of abuse of process is "misusing[] or misapplying process justified in itself for an end other than that which it was designed to accomplish", the gist of malicious prosecution is "*commencing* an action or *causing* process to issue without justification". W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 121, at 897 (5th ed. 1984) (emphasis added). That distinction is well established in Texas law. "It is critical to a cause of action for abuse of process that the process be improperly used *after* it has been issued. If wrongful intent or malice *caused* the process to be issued initially, the claim is instead one for malicious prosecution." ***Bossin v. Towber***, 894 S.W.2d 25,

33 (Tex. App. -- Houston 1994, *writ denied*) (internal citations omitted; second emphasis added). A consequence of the distinction is that, for abuse of process, a plaintiff need not prove the proceeding terminated in his favor or was instigated without probable cause. *See* PROSSER, § 121, at 897.

Although process is usually "caused" to issue as a result of a charge filed by the malicious prosecution defendant, a person may be liable for "procuring" a criminal prosecution "if [as claimed in this case] his actions were enough to cause the prosecution, and but for his actions the prosecution would not have occurred". ***Lieck*** , 881 S.W.2d at 293 (internal quotation marks omitted). Although ordinarily "[a] person does not procure a criminal prosecution when the decision whether to prosecute is left to the discretion of another, including a law enforcement official or the grand jury", liability may lie where, as claimed in this action, "the person provides information which he knows is false". ***Id.*** (internal quotation marks omitted).

Malicious prosecution is also a close cousin of false imprisonment. The critical distinction is that malicious prosecution generally lies where the plaintiff was detained pursuant to legal process; false imprisonment, where the plaintiff's arrest was accomplished without process issuing (*e.g.*, without a warrant). *See* ***Heck v. Humphrey***, 512 U.S. 477, 484, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994) ("The common-law cause of action for malicious prosecution ..., unlike the related cause of action for false arrest or imprisonment, ... permits damages for confinement imposed pursuant to legal process.").

Texas has long observed this difference. "Hence the distinction at common law between the action for false

imprisonment and that for malicious prosecution[:] The first could be maintained only when the arrest was made without legal process; and the latter when the process of the law had been perverted and improperly used without probable cause and for a malicious purpose." ***Hubbard v. Lord***, 59 Tex. 384, 385-86 (1883) (internal citations omitted). Of course, the situation might arise where a detention effected without process is followed by an improper prosecution. In such a situation, "the plaintiff may be required to assert both false imprisonment and malicious prosecution to recover all his damages". PROSSER, § 119, at 886.

Again, the interest at issue in common-law malicious prosecution, as the name of the claim makes clear, is "the individual's interest in freedom from unjustifiable and oppressive *criminal prosecution*". ***Richey***, 952 S.W.2d at 517 (emphasis added). *In short, it reaches far beyond an improper arrest -- a target of the Fourth Amendment.* Accordingly, "the *elements of damage* in cases of malicious prosecution are physical injury, injury to feelings and reputation, injury to property, loss of time, and expenses". ***Equitable Life Assurance Soc'y of the U.S. v. Lester***, 110 S.W. 499, 502 (Tex. Civ. App. 1908) (emphasis added). Moreover, "[a] suit for malicious prosecution so far partakes of the nature of a criminal proceeding as to admit of the recovery of exemplary damages in the nature of a penalty". ***McManus v. Wallis***, 52 Tex. 534, 547 (1880).

Our court has recognized § 1983 malicious prosecution claims. And, it has suggested that the *common-law* tort of malicious prosecution, *by itself*, may somehow amount to deprivation of a constitutional right. *See, e.g.*, ***Gordy***, 294 F.3d at 725 (cited by majority). But, our court has not clearly identified the federal right implicated by malicious prosecution.

In ***Shaw v. Garrison***, 467 F.2d 113 (5th Cir.), *cert. denied*, 409 U.S. 1024, 93 S. Ct. 467, 34 L. Ed. 2d 317 (1972), our court recognized a claim akin to the current one for § 1983 malicious prosecution. Shaw had been acquitted in a state criminal prosecution for conspiracy to assassinate President Kennedy. 467 F.2d at 114. In that proceeding, Shaw testified he did not know his alleged co-conspirators. ***Id.*** After Shaw's acquittal, the State charged he had lied in that regard. ***Id.***

While the perjury prosecution was pending, Shaw sought federal injunctive relief under, *inter alia*, § 1983. ***Id.*** at 115. The district court enjoined the perjury prosecution, finding it "was brought in bad faith and for purposes of harassment". 328 F. Supp. 390, 400 (E.D. La. 1971). On appeal, our court recognized a "federal right to be free from bad faith prosecutions", holding that showing such prosecution "is equivalent to a showing of irreparable injury for purposes of the comity restraints defined in ***Younger*** [***v. Harris***, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)]".[76] 467 F.2d at 120. Accordingly, our court affirmed the injunction. ***Id.*** at 122.

Shaw did not identify the source or nature of the constitutional right violated by a "bad faith prosecution". Subsequent case law, however, seemed to identify Fourteenth Amendment due process. In ***Wheeler v. Cosden Oil & Chem. Co.***, 734 F.2d 254 (5th Cir. 1984), our court had to determine whether the § 1983 claim recognized in ***Shaw*** survived

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[76] ***Younger*** and its progeny explicated the "national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances". ***Younger***, 401 U.S. at 41.

Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975). ***Wheeler*** characterized ***Gerstein*** as holding

> that the Fourth Amendment requires of the states a judicial or neutral determination of probable cause to arrest as a prerequisite for extended restraint of liberty following arrest, and specifically that a prosecutor's decision to prosecute is not a constitutionally sufficient determination of probable cause.

Wheeler, 734 F.2d at 258. ***Wheeler*** recognized that, under ***Gerstein***, "this Fourth Amendment protection is attendant on *arrest and detention alone* and does not bear on the *decision* to prosecute". ***Id.*** at 259 (emphasis added). Therefore, our court was left to answer what level of suspicion, if any, is requisite for a prosecutor's decision to charge. ***Id.***

After exploring the text of the Fourth Amendment, policy considerations, and ***Gerstein***, our court concluded: "The Fourteenth Amendment imposes a duty on state prosecutors to charge only upon ascertaining probable cause". ***Id.*** at 260 (emphasis added).[77] Because ***Shaw*** simply "enjoined a state

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[77] Significantly, review of the Fourth Amendment merely informed our court that the Amendment's clause providing "no Warrants shall issue, but upon probable cause", U.S. CONST. amend. IV, "clearly *contemplates* that before any person is seized by the State *someone* must first have determined that there was probable cause to believe he had broken the law". ***Wheeler***, 734 F.2d at 259 (first emphasis added). Our court declined to decide whether that clause applied in ***Wheeler***. In later cases, our court noted that malicious prosecution claims could, in fact, implicate Fourth Amendment guarantees, but *only* where "the individual complains of an arrest, detention, and prosecution without probable cause". ***Thomas v. Kippermann***, 846 F.2d 1009, 1011 (5th Cir.

prosecution for perjury on the ground that it was brought 'in bad faith'--*i.e. without probable cause*", ***id.*** at 258 (emphasis added), ***Wheeler*** held a § 1983 malicious prosecution claim survived Gerstein. ***Id.*** at 260.

Brummett v. Camble, 946 F.2d 1178 (5th Cir. 1991), *cert. denied*, 504 U.S. 965, 112 S. Ct. 2323, 119 L. Ed. 2d 241 (1992), cast some doubt on a § 1983 malicious prosecution claim. A footnote to that opinion, which otherwise recognized the action as part of our precedent, questioned "whether ***Wheeler*** would survive the Supreme Court's recent attempts to predicate constitutional rights on a more textual footing", because ***Wheeler*** had rested "on the *implied* constitutional right to have charges brought only upon probable cause". ***Id.*** at 1181 n.2 (emphasis added). That footnote clarified that "***Wheeler*** would, however, clearly survive to the extent that a malicious prosecution caused a plaintiff's pretrial detention or otherwise infringed specific constitutional guarantees". ***Id.***

At long last, the earlier cited ***Albright v. Oliver***, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994), provided some guidance. It addressed whether violation of Albright's claimed Fourteenth Amendment substantive due process right to be free of prosecution without probable cause -- essentially the same right on which our court premised its holding in ***Wheeler*** -- could serve as the basis for a § 1983 malicious prosecution claim. ***Id.*** at 268.

Upon becoming aware of a warrant for his arrest on a drug-related charge, Albright surrendered to Officer Oliver

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1988); ***Sanders v. English***, 950 F.2d 1152, 1159 (5th Cir. 1992) (same). *See* text *infra*.

and was released after posting bond. ***Id.*** His release was conditioned on his agreeing not to leave the state without court permission. ***Id.*** At a preliminary hearing, at which Officer Oliver allegedly gave misleading testimony, the state court found probable cause to try Albright. ***Id.*** at 269, 279. Subsequently, the case was dismissed pretrial, because the charge did not state an offense under state law. ***Id.*** at 269.

Albright then brought an action under § 1983 against the Officer, claiming he had "deprived him of substantive due process under the Fourteenth Amendment -- his '*liberty interest*' -- to be free from criminal prosecution except upon probable cause". ***Id.*** at 269 (emphasis added). The complaint also presented a common-law malicious prosecution claim against the Officer. **Id.** at 269 n.2.

A plurality opinion, written by Chief Justice Rehnquist and joined by Justices O'Connor, Scalia, and Ginsburg, began by surveying the approaches circuits had taken for § 1983 malicious prosecution claims. Noting that "most of the lower courts recognize some form of malicious prosecution action under § 1983", the plurality pinpointed the disagreement as "whether malicious prosecutions, *standing alone*, can violate the Constitution". ***Id.*** at 270 n.4 (emphasis added). It stated that the Third Circuit had provided for the most expansive claim, "holding that the elements of a malicious prosecution action under § 1983 are the same as the common-law tort of malicious prosecution". ***Id.*** (*citing* ***Lee v. Mihalich***, 847 F.2d 66, 70 (3d Cir. 1988)). "Other Circuits, however, required a showing of some injury or deprivation of a constitutional magnitude *in addition to* the traditional elements of common-law malicious prosecution." ***Id.*** (emphasis added). Citing our court's opinion in Sanders, *supra* note 3, the plurality characterized our circuit's position as more akin to that of the Third Circuit.

The plurality reiterated that "Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred'". 510 U.S. at 271 (*quoting* ***Baker***, 443 U.S. at 144 n.3). Albright had claimed violation of a "substantive due process right to be free of prosecution without probable cause", ***id.***; but, "where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, *that Amendment, not the more generalized notion of substantive due process*, must be the guide for analyzing these claims". 510 U.S. at 273 (citation and internal quotation marks omitted; emphasis added). Because "the Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it", the plurality concluded that "substantive due process ... can afford [Albright] no relief". ***Id.*** at 274, 275. *The plurality refused to decide whether Albright's claim would have succeeded had it been framed to implicate a Fourth Amendment violation.* ***Id.*** at 275.

In addition to joining the plurality opinion, Justice Scalia separately emphasized: "It [was] unlikely that the procedures constitutionally 'due,' with regard to an arrest, consist of anything more than what the Fourth Amendment specifies"; and, with the exception of certain "long established and narrowly limited" substantive protections incorporated by the Court into the Fourteenth Amendment, the Due Process Clause does not "guarantee[] certain (unspecified) liberties". 510 U.S. at 275 (Scalia, J., concurring).

Justice Kennedy, whom Justice Thomas joined, concurred in the judgment but wrote separately because he understood "Albright's due process claim concerned not his arrest but instead the malicious initiation of a baseless criminal prosecution against him". 510 U.S. at 281 (Kennedy, J.,

concurring in the judgment). This notwithstanding, and significantly for purposes of Castellano's action, Justices Kennedy and Thomas "agreed with the plurality that *an allegation of arrest without probable cause* must be analyzed under the Fourth Amendment without reference to more general considerations of due process". ***Id.*** (emphasis added). Nevertheless, in the light of precedent that "a state actor's random and unauthorized deprivation of the interest [in freedom from malicious prosecution] cannot be challenged under [§] 1983 so long as the State provides an adequate postdeprivation remedy", 510 U.S. at 284 (*citing* ***Parratt v. Taylor***, 451 U.S. 527, 535-44, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981)), and because *state law* afforded Albright an action for malicious prosecution, Justices Kennedy and Thomas saw "neither need nor legitimacy to invoke § 1983". 510 U.S. at 286.[78]

Justice Souter also concurred in the judgment but wrote separately, in part to emphasize that "there may indeed be exceptional cases where some quantum of harm occurs in the interim period after groundless criminal charges are filed but before any Fourth Amendment seizure". 510 U.S. at 291 (Souter, J., concurring in the judgment). Still, in concluding that Albright had not established a substantive due process violation, Justice Souter agreed with the plurality that Albright's claim "presented no substantial burden on liberty beyond what the Fourth Amendment is generally thought to redress already". 510 U.S. at 288-89.

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[78] The Seventh Circuit recently adopted this view, holding that, where, as in the case at hand, state law provides a malicious prosecution damages remedy, there is no such constitutional damages remedy. ***Newsome v. McCabe***, 256 F.3d 747 (7th Cir. 2001).

In addition to joining the plurality opinion, Justice Ginsburg opined that Albright would have stated a claim had he pressed a Fourth Amendment, rather than a Fourteenth Amendment substantive due process, right. 510 U.S. at 276-77 (Ginsburg, J., concurring). She opined that Albright may have abandoned a Fourth Amendment avenue of approach because he

> feared that courts *would narrowly define the Fourth Amendment's key term "seizure" so as to deny full scope to his claim*. In particular, he might have anticipated a holding that the "seizure" of his person ended when he was released from custody on bond, and a corresponding conclusion that Oliver's allegedly misleading testimony at the preliminary hearing escaped Fourth Amendment interdiction.

510 U.S. at 277 (emphasis added).

For Justice Ginsburg, however, the duration of a seizure might "continue even after release from official custody", because the released defendant may be: haled into court on the State's command; required to obtain permission before traveling outside the court's jurisdiction; and subjected to diminished employment prospects, reputational harm, and the financial/emotional strain of preparing a defense. 510 U.S. at 277-78. In that light, the allegedly misleading testimony by Albright's arresting officer at the preliminary hearing "served to maintain and reinforce the unlawful haling of Albright into court, and so perpetuated the Fourth Amendment violation". 510 U.S. at 279. The Court, however, has never adopted such an expansive concept of Fourth Amendment "seizure".

Nor have our post-***Albright*** decisions clarified the contours of a § 1983 malicious prosecution claim. ***Johnson v.***

La. Dep't of Agric., 18 F.3d 318 (5th Cir. 1994), concerned a § 1983 malicious prosecution claim for a *First* Amendment deprivation. Our court noted: "The Supreme Court ... recently held [in ***Albright***] that malicious criminal prosecution, if actionable in constitutional law, should be governed by the Fourth Amendment rather than substantive due process, with its 'scarce and open-ended' 'guideposts'". ***Id.*** at 320 (*quoting* ***Albright***, 510 U.S. at 275). Noting that "it is an even more complex question whether and on what basis a First Amendment claim of malicious prosecution can be made", our court stated: "Whether the Constitution comprehends any such claim is far from clear". ***Id.*** Regardless, our court held that, at a minimum, "if the First Amendment protects against malicious prosecution, Johnson must *not only* allege a deprivation of a constitutional right, *but must also* establish all of the elements of the common law tort action". ***Id.*** (emphasis added). Because Johnson had not satisfied the favorable-prosecution-termination element of the common-law tort, the district court's dismissal was upheld.

Another of our early post-***Albright*** opinions considered the validity of, but did not reach the merits for, a § 1983 malicious prosecution claim. In so doing, our court explained: "***Albright*** held that pre-trial deprivations of liberty, such as malicious prosecution, are not actionable under the Fourteenth Amendment, *but left open the possibility* that such claims would be actionable under the Fourth Amendment". ***Eugene v. Alief Indep. Sch. Dist.***, 65 F.3d 1299, 1303 (5th Cir. 1995) (emphasis added), *cert. denied sub nom.*, 517 U.S. 1191, 134 L. Ed. 2d 782, 116 S. Ct. 1680 (1996).

Eugene then observed in *dictum*: "This circuit has explicitly held that malicious prosecution, false arrest and bodily harm are actionable under Section 1983 because they violate the Fourth and Fourteenth Amendments". ***Id.*** For that

proposition, our court cited ***Sanders***, *supra* note 3. ***Sanders***, a pre-***Albright*** case, recognized that malicious prosecution "implicates the *constitutional guarantees of the fourth and fourteenth amendments when the individual complains of an arrest, detention, and prosecution without probable cause*". ***Sanders***, 950 F.2d at 1159 (emphasis added; quoting ***Thomas v. Kippermann***, 846 F.2d 1009, 1011 (5th Cir. 1988)). ***Eugene*** failed, however, to reiterate this qualifying language. Moreover, ***Eugene*** recognized the right against malicious prosecution as "clearly established" under the *Fourth* Amendment but justified that assertion only by citing ***Shaw***, *supra*, the earlier-discussed *Fourteenth* Amendment, pre-***Albright*** case. *See* ***Eugene***, 65 F.3d at 1305*; see also* ***Kerr v. Lyford***, 171 F.3d 330, 342 & n.8 (Jones, J., specially concurring) (questioning the ***Eugene*** opinion).

Our court made similarly questionable conclusions in ***Evans v. Ball***, 168 F.3d 856 (5th Cir. 1999). There, our court had to decide, *inter alia*, whether a plaintiff claiming "prosecution unsupported by probable cause" had, for purposes of defeating qualified immunity, stated a violation of a clearly established constitutional right. ***Id.*** at 862 n.9. Our court construed the claim as one for malicious prosecution, because "a prosecution that is unsupported by probable cause but does not rise to the level of malicious prosecution is not a clearly established constitutional violation". ***Id.*** It observed, quite correctly, that "the text of the Fourth Amendment does not support the proposition that a *prosecution* not based on probable cause is a constitutional violation". ***Id.*** (emphasis added). It failed, however, to consider whether the text of the Fourth Amendment supports the proposition that a *malicious prosecution* is necessarily a constitutional violation. Instead, citing a pre-***Albright*** opinion (as had ***Eugene***), it simply reiterated "that malicious prosecution may be a constitutional

violation, but only if all of its common law elements are established". ***Id.*** (*citing* ***Brummett***, 946 F.2d at 1183).

Next in our significant post-***Albright*** decisions was ***Kerr v. Lyford***, 171 F.3d 330 (5th Cir. 1999). ***Kerr*** affirmed the summary judgment awarded § 1983 defendants; but, the majority opinion, citing ***Eugene***, spoke of a "long-standing recognition of a Fourth Amendment right to be free from malicious prosecution". ***Id.*** at 339. Again, as had ***Eugene***, the ***Kerr*** majority opinion failed to mention that this "long-standing recognition" applied only where "the individual complains of an arrest, detention, and prosecution without probable cause".[79] *See supra* note 2.

The special concurrence in ***Kerr***, joined by another member of the panel, was our court's first attempt, in the light of ***Albright***, to address the problems of allowing a § 1983 malicious prosecution claim. After noting that "the ***Albright*** plurality, rather than endorsing a Fourth Amendment tort of malicious prosecution, declined to address the issue", the special concurrence emphasized: "Even if ***Albright*** left room for such a claim under the Fourth Amendment, there is a significant difference between predicating the cause of action on the Fourth Amendment and the Fourteenth". ***Kerr***, 171 F.3d at 342-43 (Jones, J., concurring). As the special concurrence noted, this fact is evident in the very need to

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[79] Our court's not requiring *independent* proof of a Fourth Amendment violation, even post-***Albright***, has not gone unnoticed. *See, e.g.*, ***Frantz v. Village of Bradford***, 245 F.3d 869, 874 (6th Cir. 2001) (*citing* ***Kerr*** as an example of a circuit's analyzing § 1983 malicious prosecution claims under state-law elements and not under the Fourth Amendment); ***Lambert v. Williams***, 223 F.3d 257, 261 (4th Cir. 2000) (same), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797, 121 S. Ct. 889 (2001).

decide ***Albright***: "On the most superficial level, if the grounds for the claim under the Fourth and Fourteenth Amendments were equivalent, there would have been no need to distinguish between those amendments in ***Albright***". ***Id.*** at 343. Finally, and most significantly, it observed:

> The tort of malicious prosecution *fits uneasily* within the Fourth Amendment. That amendment proscribes unreasonable searches and seizures and has been held to prohibit arbitrary law enforcement actions up until the time of arraignment. *To justify a Fourth Amendment malicious prosecution claim, then, one has to extend the period of "seizure" past arraignment.*

Id. (emphasis added).[80] This "uneasy fit" is again discussed in ***Gordy*** , 294 F.3d at 725-27.

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[80] This seizure-expansion concern is correct for almost all § 1983 malicious prosecution claims. Under certain circumstances, however, it may not hold. As discussed *supra*, malicious prosecution is the appropriate common-law vehicle for challenging an unreasonable seizure effected "pursuant to legal process". *See also* ***Heck v. Humphrey***, 512 U.S. 477, 484, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994) ("The common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered here because, unlike the related cause of action for false arrest or imprisonment, it permits damages for confinement imposed pursuant to legal process.").

Where, as here, the arrest is by warrant, then the arrest is pursuant to legal process. Therefore, such an arrest could serve as the starting point for the "seizure" required to justify a § 1983 malicious prosecution claim. In that situation, for a prosecution that continued past the arraignment, the period of "seizure" would have to be likewise extended for purposes of the § 1983 claim.

The same is true for a *warrantless* arrest, which, of course, is *not* effected pursuant to legal process. In that situation, generally, *the legal process begins with arraignment*. Accordingly, to justify a § 1983 malicious prosecution claim, such a plaintiff would have to extend the period of seizure past the arraignment -- *e.g.*, by claiming his being bound-over for trial constitutes a "seizure". *See generally* ***Singer v. Fulton County Sheriff***, 63 F.3d 110, 116-17 (2d Cir. 1995), *cert. denied*, 517 U.S. 1189, 116 S. Ct. 1676, 134 L. Ed. 2d 779 (1996).

On the other hand, the defendant may be arrested pursuant to warrant, but the prosecution dismissed before or at the arraignment. For such instances, the period of "seizure" need not be expanded.

The key seizure/arraignment incongruity noted in the ***Kerr*** special concurrence is hardly the lone peculiarity of recognizing a § 1983 malicious prosecution claim. As Justice Ginsburg noted in her ***Albright*** concurrence,

> Albright's reliance on a "malicious prosecution" theory, rather than a Fourth Amendment theory, is anomalous. The principal player in carrying out a prosecution -- in the formal commencement of a criminal proceeding -- is not police officer but prosecutor. Prosecutors, however, have absolute immunity for their conduct. Under Albright's substantive due process theory, the star player is exonerated, but the supporting actor is not.

Albright, 510 U.S. at 279 n.5 (Ginsburg, J., concurring) (internal quotations and citations omitted).

Yet another peculiarity concerns the limitations period for a § 1983 malicious prosecution claim. *If* the post-***Albright*** justification for a § 1983 malicious prosecution claim is the Fourth Amendment, then some might maintain that the limitations period should run from the date of arrest, rather than from the occurrence of the last element of the malicious prosecution tort (termination of the prosecution in plaintiff's favor). *See id.* at 280 & n.6 (Ginsburg, J., dissenting). But, as have some other circuits, our court has held, without acknowledging the basis for debate, that the limitations period accrues as of the prosecution's termination. *See* ***Eugene***, 65 F.3d at 1306.[81]

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[81] Some circuits have also addressed this issue. In ***Brooks v. City of Winston-Salem***, 85 F.3d 178 (4th Cir. 1996), the Fourth Circuit held that a § 1983 claim for a *warrantless* arrest

Of course, because the favorable termination is an element of a § 1983 malicious prosecution claim, accrual at that point is understandable -- certainly in theory. On the other hand, *if* the constitutional basis for this § 1983 claim is the underlying seizure (arrest), it may occur any time from shortly before the favorable termination to years before it, as in Castellano's situation. Instances in which the arrest is far removed from the favorable termination, especially because of the possible resulting loss of evidence concerning the arrest, vividly demonstrate the "uneasy fit" of malicious prosecution under § 1983, based on the Fourth Amendment.[82]

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unsupported by probable cause -- a claim most analogous to the common-law tort of false arrest -- accrues as of the date of arrest. *See id.* at 182. However, a § 1983 claim for an arrest made by warrant unsupported by probable cause -- more analogous to the common-law tort of malicious prosecution -- accrues from the time of favorable termination. *See id.* at 183. *See also* ***Uboh v. Reno***, 141 F.3d 1000, 1006 (11th Cir. 1998) (holding that § 1983 malicious prosecution claim accrues on the date of favorable termination).

Justice Ginsburg suggested there might not be a difference between the point of arrest and the point of termination; in her view, a Fourth Amendment "seizure" may continue so long as prosecution remains pending and, therefore, "the time to file the § 1983 action should begin to run not at the start, but at the end of the episode in suit, *i.e.*, upon dismissal of the criminal charges". *See* ***Albright***, 510 U.S. at 280 (Ginsburg, J., concurring). As noted earlier, however, such an approach requires a significant expansion of our understanding of the Fourth Amendment's protections.

[82] ***Heck*** casts some light on this limitations question. There, the Court considered whether a state prisoner's " § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence", 512 U.S. at 489-90, could proceed in the light of the fact that success on the claim would "call into question the

But perhaps the most troubling -- and thus far overlooked -- problem with a § 1983 malicious prosecution claim concerns probable cause. One of the earlier listed elements of *common-law* malicious prosecution is that "the defendant lacked probable cause to instigate the prosecution". ***Rodriguez v. Wal-Mart Stores, Inc.***, 52 S.W.3d 814, 820 (Tex. App. -- San Antonio 2001); ***Thrift v. Hubbard***, 974 S.W.2d 70 (Tex. App. -- San Antonio 1998, *review denied*).

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lawfulness of conviction or confinement", ***id.*** at 483. For assistance in answering that question, ***Heck*** looked to common-law malicious prosecution "because, unlike the related cause of action for false arrest or imprisonment, it permits damages for confinement imposed pursuant to legal process". ***Id.*** at 484. Noting that an element of the common-law tort is termination of the prior criminal proceeding in favor of the accused, and that the same policy reasons apply to § 1983 claims, the Court held Heck's claim barred. "Just as a cause of action for malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor, so also a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." ***Id.*** at 489-90 (internal citations omitted).

Along this line, several observations about ***Heck*** are warranted. First, it is not clear that Heck's § 1983 claim was *for* malicious prosecution. Although the Court determined that malicious prosecution was the closest *common-law* analogy to Heck's claim, it referred to his claim as one "for damages attributable to an unconstitutional conviction or sentence", ***id.*** at 490, and "to recover damages for allegedly unconstitutional conviction or imprisonment", ***id.*** at 486. Moreover, ***Albright*** had been decided only four months earlier; but ***Heck*** does not mention ***Albright***. Finally, the allegations in ***Heck*** included, *inter alia*, pre-trial and trial abuses that went well beyond the "initiation" or "procurement" of a criminal proceeding.

As noted, Texas law dictates the common-law elements in the present case and is not atypical on this particular point. The requisite lack of probable cause is defined as "the [lack of the] existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts *within the knowledge of the prosecutor [complainant]*, that the person charged was guilty of the crime for which he was prosecuted". ***Richey v. Brookshire Grocery Co.***, 952 S.W.2d 515, 517, 40 Tex. Sup. Ct. J. 839 (Tex. 1997) (alteration in original; emphasis added) (*quoting* ***Akin v. Dahl***, 661 S.W.2d 917, 921, 27 Tex. Sup. Ct. J. 23 (Tex. 1983)); ***Brown v. NationsBank Corp.***, 188 F.3d 579, 586 (5th Cir. 1999) (same), *cert. denied sub nom.* 530 U.S. 1274, 120 S. Ct. 2740, 147 L. Ed. 2d 1004 (2000). "The probable cause inquiry focuses only on the actions of the complainant, based upon *his* perspective of the facts *at the time the report was made*, and not on the subsequent actions of third-parties or information discovered after the fact". ***Thrift***, 974 S.W.2d at 79 (emphasis added).

On the other hand, for a Fourth Amendment seizure (arrest), the relevant touchstone post-***Albright***, the probable cause inquiry differs on several fundamental, and profoundly important, levels.

> Probable cause to arrest an individual exists when the facts and circumstances within *the arresting officer's* personal knowledge, or of which he has reasonably trustworthy information, are sufficient to occasion a person of reasonable prudence to believe an offense has been committed. A magistrate determines that probable cause exists from the totality of circumstances presented to him in the warrant application. We review his decision, and the police officer's decision to seek an arrest warrant, by

> evaluating the facts available *to the officer at the* time he submitted the application.

Bennett v. Grand Prairie, 883 F.2d 400, 404 (5th Cir. 1989) (emphasis added; footnotes, citations, and internal quotation marks omitted).

Several important features of this description distinguish Fourth Amendment probable cause from the probable cause at issue for common-law malicious prosecution. First, the former assesses probable cause *vel non* from the facts and circumstances within the knowledge of the arresting officer -- not the complainant. Second, it measures probable cause *vel non* as of the time an application for the warrant is submitted -- not when the complainant makes his report. In short, the Fourth Amendment probable cause inquiry is fundamentally distinct and separate from the probable cause inquiry for common-law malicious prosecution.[83]

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[83] A point tangential to this probable cause discussion needs mentioning. It involves the malicious prosecution defendant's state of mind. The Fourth Amendment probable cause inquiry is an *objective* one. But, our continued reliance on the common-law elements requires us to look for malice in the defendant's actions. This inconsistency has induced at least one circuit to abandon the malice element:

> We recognize that actual malice is an element of a malicious prosecution claim at common law. And, common-law principles "provide the appropriate starting point for" determining the elements of § 1983 actions. However, the Supreme Court has indicated that the reasonableness of a seizure under the Fourth Amendment should be analyzed from an objective perspective. Thus, we conclude that the subjective state of mind of the

At the very least, these incongruities cast doubt on whether, as a matter of law, a § 1983 malicious prosecution claim can exist. Nevertheless, our precedent compels recognizing the claim in some form. Restated, this panel is saddled with an anomalous claim. I reiterate the observation in the ***Kerr*** special concurrence: ***Albright*** did *not endorse* a Fourth Amendment tort of malicious prosecution. *See* ***Kerr***, 171 F.3d at 342 (Jones, J., concurring); *see also* ***Johnson***, 18 F.3d at 320 ("Significantly, the [***Albright***] Court expressed no view whether such a claim would succeed under the Fourth Amendment."); 1A SCHWARTZ, note 10, at 322 (noting that the various ***Albright*** opinions "add[] up to a fairly strong sentiment *against constitutionalizing malicious prosecution*" (emphasis added)). However, bound by our precedent recognizing a § 1983 malicious prosecution claim, only *en banc* review (or, of course, a decision by the Supreme Court) can settle whether such a claim can exist. As stated, it is my hope -- and request -- that this case be the vehicle for doing so.

The task at present, then, is to ensure that, for the § 1983 malicious prosecution claim presented here, this panel maintains -- to the extent possible -- consistency with the dictates of § 1983, the Fourth Amendment, ***Albright***, and our precedent. The latter requires a § 1983 malicious prosecution plaintiff to prove the common-law tort elements, including the

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defendant, whether good faith or ill will, is irrelevant in this context.

Brooks v. City of Winston-Salem, 85 F.3d 178, 184 n.5 (4th Cir. 1996) (citations omitted); *see also* 1A MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION § 3.20, at 326 (3d ed. 1997) (noting that the Second Circuit appears to have abandoned the malice element).

defendant's lacking probable cause *at the time he reported the crime*. Section 1983 requires proving violation of a federal right. And, ***Albright*** seems to require that, *in a situation such as Castellano's*, the right violated be one secured by the Fourth Amendment.[84]

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[84] Different circuits have interpreted the ***Albright*** requirement differently. Some understand ***Albright*** to hold that a § 1983 malicious prosecution can *only* reside in the Fourth Amendment. *See, e.g.*, ***Murphy v. Lynn***, 118 F.3d 938, 944 (2d Cir. 1997) ("In order to prevail on [a malicious prosecution] claim under § 1983, the plaintiff must show a violation of his rights under the Fourth Amendment".), *cert. denied*, 522 U.S. 1115, 118 S. Ct. 1051, 140 L. Ed. 2d 114 (1998); *see also* ***Lambert v. Williams, 223 F.3d 257, 262 (4th Cir. 2000)*** ("There is no such thing as a ' § 1983 malicious prosecution' claim. What we [have] termed a 'malicious prosecution' ... is simply a claim founded on a Fourth Amendment seizure that incorporates elements of the analogous common law tort of malicious prosecution -- specifically, the requirement that the prior proceeding terminate favorably to the plaintiff".).

The Seventh Circuit formerly also interpreted ***Albright*** to require a § 1983 malicious prosecution claim to be located in the Fourth Amendment. ***Washington v. Summerville***, 127 F.3d 552, 558 (7th Cir. 1997) ("***Albright*** ... instructs that the only constitutional amendment that is implicated by a malicious prosecution claim is the Fourth Amendment."), *cert denied*, 523 U.S. 1073, 118 S. Ct. 1515, 140 L. Ed. 2d 668 (1990). As noted, it abandoned that approach recently, holding: the concurring opinion of Justices Kennedy and Thomas in ***Albright*** controls; consequently, where state law provides a malicious prosecution damages remedy, there is no such constitutional damages remedy. ***Newsome*** , 256 F.3d 747.

By contrast, the Third Circuit reads ***Albright*** "for the broader proposition that a section 1983 claim may be based on a constitutional provision other than the Fourth Amendment". ***Torres***

Finally, for a Fourth Amendment violation, the plaintiff must prove the *arresting officer* lacked probable cause *at the time he applied for a warrant*. In sum, as discussed further below, it would seem that a § 1983 malicious prosecution plaintiff must allege and prove, *inter alia*, two unique instances of a lack of probable cause.

This approach -- requiring proof of both the common-law tort elements *and* a Fourth Amendment violation -- is not unique. Our court recently took that approach in ***Price v.***

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v. McLaughlin, 163 F.3d 169, 172 (3d Cir. 1998), *cert. denied*, 528 U.S. 1079, 120 S. Ct. 797, 145 L. Ed. 2d 672 (2000). The Sixth Circuit interprets ***Albright*** differently yet:

> ***Albright*** holds only that in cases in which a Fourth Amendment violation has occurred, a § 1983 claim cannot be brought under notions of substantive due process. ***Albright*** appears to acknowledge that in cases of egregious behavior that do not include a seizure, a plaintiff may have a § 1983 malicious prosecution claim supported by substantive due process rights.

Frantz v. Village of Bradford, 245 F.3d 869, 877 (6th Cir. 2001).

As noted, in a case involving a claim of malicious prosecution in violation of First Amendment rights, we stated: "Whether the Constitution comprehends any such claim is far from clear". ***Johnson***, 18 F.3d at 320. However, whether a § 1983 malicious prosecution claim can have its roots anywhere *other* than in the Fourth Amendment is *not* at issue in this case. Although Castellano complained of First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment violations, summary judgment was awarded Fragozo and Sanchez on all but the First and Fourth Amendment claims. On appeal, Castellano has waived his First Amendment claim, stating that his malicious prosecution claim is rooted solely in the Fourth Amendment.

Roark, 256 F.3d 364 (5th Cir. 2001), noted *supra*. Officer Roark arrested Price on charges of a license tag violation and arson. Price was convicted for the tag violation; the arson charge was dropped. ***Id.*** at 367. He filed § 1983 false arrest and malicious prosecution claims relating to the arson charge. Officer Roark took an interlocutory appeal from the denial of qualified immunity. ***Id.*** at 368.

In addressing the false arrest claim, our court held there was probable cause concerning the tag violation and, as a result, probable cause existed for the arrest. ***Id.*** at 369-70. As for the malicious prosecution claim, it noted: "While we have recognized a § 1983 cause of action for malicious prosecution, 'it is fundamental to our federal jurisprudence that state tort claims are not actionable under federal law; a plaintiff under § 1983 must show deprivation of a federal right.'" ***Id.*** at 370 (*citing* ***Nesmith v. Taylor***, 715 F.2d 194, 196 (5th Cir. 1983)). Accordingly, our court held: "To succeed on [his] § 1983 malicious prosecution suit, *Price must show that he was exposed to an unreasonable search or seizure in violation of the Fourth Amendment*". ***Id.*** (emphasis added). But, because the arrest was supported by probable cause for the tag violation, "Price suffered no violation of his Fourth Amendment rights". 256 F.3d at 367. Accordingly, Officer Roark was held entitled to qualified immunity.

Pre-***Price***, a similar position was taken in ***Johnson***, discussed *supra*. ***Johnson*** involved a claim for malicious prosecution in violation of First Amendment rights. Our court stated, without deciding whether such a claim is cognizable under the Constitution, that, "at the very least, if the First Amendment protects against malicious prosecution, [a plaintiff] must not only *allege* a deprivation of a constitutional right, but must also *establish* all of the elements of the

common law tort action". ***Johnson***, 18 F.3d at 320 (emphasis added).

As discussed in ***Gordy***, 294 F.3d at 725-26, other circuits take this two-pronged approach. *See, e.g.*, ***Taylor v. Meacham***, 82 F.3d 1556, 1561 (10th Cir.) ("Our circuit takes the common law elements of malicious prosecution as the 'starting point' for the analysis of a § 1983 malicious prosecution claim, but always reaches the ultimate question, which it must, of whether the plaintiff has proven a *constitutional* violation [of] the Fourth Amendment's right to be free from unreasonable seizures." (emphasis added)), *cert. denied*, 519 U.S. 871, 117 S. Ct. 186, 136 L. Ed. 2d 125 (1996); ***Reed v. City of Chicago***, 77 F.3d 1049, 1051 (7th Cir. 1996) ("To state a claim for malicious prosecution under section 1983, a plaintiff must demonstrate that: (1) he has satisfied the requirements of a state law cause of action for malicious prosecution; (2) the malicious prosecution was committed by state actors; and (3) he was deprived of liberty."); ***Singer v. Fulton County Sheriff***, 63 F.3d 110, 116 (2d Cir. 1995) ("Once a plaintiff presents a claim of malicious prosecution under § 1983, the court must engage in two inquiries: whether the defendant's conduct was tortious; and whether the plaintiff's injuries were caused by the deprivation of liberty guaranteed by the Fourth Amendment."), *cert. denied, 517 U.S. 1189, 134 L. Ed. 2d 779, 116 S. Ct. 1676 (1996). But see* ***Frantz v. Village of Bradford***, 245 F.3d 869, 874-75 (6th Cir. 2001) ("We unanimously reject the reasoning of courts which have relied on the state law elements of malicious prosecution. We hold that establishing a § 1983 cause of action requires a constitutional violation and cannot differ depending on the tort law of a particular state."); ***Lambert v. Williams***, 223 F.3d 257, 262 (4th Cir. 2000) ("There is no such thing as a ' § 1983 malicious prosecution' claim. What we [have] termed a 'malicious prosecution' claim

... is simply a claim founded on a Fourth Amendment seizure that incorporates elements of the analogous common law tort of malicious prosecution -- specifically, the requirement that the prior proceeding terminate favorably to the plaintiff".), *cert. denied*, 531 U.S. 1130, 121 S. Ct. 889, 148 L. Ed. 2d 797 (2001).

The majority claims:

> Even if this court were to require independent proof of a violation of the Fourth Amendment in addition to proof of the tort of malicious prosecution, the analysis in this case would not change as Castellano established a violation of his Fourth Amendment rights with proof that he was seized and convicted by virtue of fraudulent evidence fabricated by the defendants--one of whom was a police officer.

Maj. Op. at 14 n. 17. In any event, in light of the foregoing discussion, this case turns on the erroneous jury instructions.

B.

The jury instructions -- based on the Fourteenth, rather than the applicable Fourth, Amendment -- are a basis for reversible error. Fragozo and Sanchez premise reversible error on the jury's being instructed in terms of a Fourteenth Amendment right to "due process", instead of a Fourth Amendment right to be free from unreasonable seizure. In pertinent part, the instruction provided:

> Castellano claims that Alfred Castro and Chris Fragozo, while acting under color of law, intentionally violated his *constitutional right to due process* by maliciously prosecuting him for the criminal offense

> of arson. Castellano further claims that Maria Sanchez, as an individual, intentionally violated *the same constitutional right*.
>
> To prove such violation, Castellano must prove each of the following by a preponderance of the evidence:
>
> (1) The defendants intentionally committed *acts that deprived him of due process*;
>
> ...
>
> To prove the defendants intentionally committed acts depriving him of *due process*, Castellano must prove they *maliciously prosecuted him* for the criminal offense of arson. *To prove this claim, Castellano must establish by a preponderance of the evidence each of the [common-law elements of malicious prosecution]*...

(Emphasis added.)

As discussed by the majority, neither Sanchez nor Fragozo objected to the instruction. Ordinarily, as also discussed by the majority, that failure would permit review only for plain error. FED. R. CIV. P. 51; *e.g.*, ***Tompkins v. Cyr***, 202 F.3d 770, 783 (5th Cir. 2000). Under that standard, our court may only correct an error that is "clear" or "obvious" and affects substantial rights. *See* ***United States v. Olano***, 507 U.S. 725, 732, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993); ***United States v. Calverley***, 37 F.3d 160, 162-64 (5th Cir. 1994) (*en banc*), *cert. denied*, 513 U.S. 1196, 115 S. Ct. 1266, 131 L. Ed. 2d 145 (1995). Even then, our court retains discretion whether to correct such an error; generally, we will do so only where the error "seriously affects the fairness, integrity or public reputation of judicial proceedings". ***Olano***, 507

U.S. at 732 (internal quotation marks omitted; alteration in original); *see also* ***Calverley*** , 37 F.3d at 164. The burden is on the party charging error, *see* ***Tompkins***, 202 F.3d at 779; and "we are exceedingly deferential to the trial court", ***id.*** at 784.

Castellano urges plain error review; and the majority applies that standard. No authority need be cited, however, for the rule that the reviewing court, not the parties, determines its standard of review.

Motions by Fragozo and Sanchez, and corresponding rulings by the district court, as well as the instructions proposed by Fragozo and Sanchez, place this standard of review issue in a most unusual -- perhaps unique -- posture. For the reasons that follow, it is not clear whether this panel should review only for plain error or, instead, under the more lenient standard applied when an objection was properly made in the trial court to the instruction at issue on appeal.

As noted, in August 1998, long in advance of the April 2000 trial, the district court granted Sanchez summary judgment on whether the § 1983 malicious prosecution claim involved Fourteenth Amendment "due process" or Fourth Amendment "seizure", holding, *inter alia*:

> Claims of malicious prosecution are not actionable under the Fourteenth Amendment. ***Albright*** ...; ***Eugene***... Claims of malicious prosecution are actionable, however, under the Fourth Amendment. ***Id.***... Rather, the Fourteenth Amendment simply makes applicable to the states the protections of the Fourth Amendment, which provides an explicit textual source of constitutional protection for a malicious

prosecution claim. ***Smart v. Bd. Of Trustees of the Univ. Of Illinois***, 34 F.3d 432, 434 (7th Cir. 1994).

No authority need be cited for the fact that, unless and until the district court revisited and revised its summary judgment holding, that holding, for that issue, was the law of the case. The holding was never explicitly altered by the district court. But, the challenged instruction utilizing due process implicitly, and obviously, altered it. Needless to say, it would seem that, had the district court intended such a change, it would have made it explicitly.

The parties' proposed instructions were included with the pretrial order, filed approximately two months before trial. *Notwithstanding the summary judgment holding that Fourteenth Amendment due process was not in play*, Castellano's proposed instruction spoke, *inter alia*, of "the right not to be deprived of liberty without due process of law" *in addition to* "the right not to be subjected to an unreasonable seizure". Castro's proposed instructions also keyed on the "right not to be deprived of liberty without due process of law".

In short, Castellano and Castro's proposed instructions are totally at odds with the law of the case established by the earlier summary judgment holding. My review of the record reveals no reason for this.

On the other hand, the instructions proposed by Sanchez, and adopted by Fragozo, spoke of being "deprived of liberty" in violation of the Constitution, without linking the deprivation to the "without due process" qualifier. The Fourth Amendment, however, was not mentioned. Consequently, Sanchez and Fragozo's proposed instructions could be read to fall under either the Fourth or Fourteenth Amendment,

because, of course, the Fourteenth Amendment proscribes being "deprived of ... liberty ... without due process of law", while the Fourth Amendment proscribes certain types of "seizures" -- which equates with "deprivations of liberty".

On balance, Sanchez and Fragozo's proposed instructions fall much more under the Fourth, than the Fourteenth, Amendment, especially in the light of the controlling case law and, even more so, because of the law of the case. Accordingly, I do not consider their proposed instructions to have constituted "invited error". *E.g.*, ***Flores v. Cameron County***, 92 F.3d 258, 270 n.9 (5th Cir. 1996) (noting that when the district court "derives [an] instruction ... from [a party's] proposed jury instructions" and that party does "not object to the instruction", "the invited error doctrine ordinarily ... precludes ... review of the instruction"). (In any event, as discussed *infra*, their proposal was not utilized by the magistrate judge. As quoted *supra*, he used "violated [Castellano's] constitutional right *to due process* by maliciously prosecuting him". (emphasis added))

At trial, however, the JMOL motions referenced the fact that, as the district court had held almost 28 months earlier, the Fourth, not the Fourteenth, Amendment was in play. After Castellano presented his case, the City, citing ***Kerr***, especially the concurring opinion discussed *supra*, urged in support of JMOL that "there is no malicious prosecution cause of action as a matter of law under Section 1983", having noted that, under ***Albright***, such a claim did not lie under the Fourteenth Amendment. Fragozo joined in expressing doubt whether a malicious prosecution claim can be presented under § 1983.

Finally, through Sanchez, the court was then reminded about its law of the case established by its summary judgment holding -- specifically that the court

> had clearly pointed out that malicious prosecution under the 14th Amendment does not exist, and indicated that it exists under the Fourth Amendment. *And so this case survived at least to proceed to trial under that particular theory*.

(Emphasis added.) And, citing the concurring opinion in ***Kerr***, Sanchez noted the question of whether challenged actions subsequent to arrest "survived under the [§ 1983] malicious prosecution cause of action".

In response, Castellano made no mention of the defendants' contentions regarding Fourteenth Amendment due process not being applicable. Nor did he mention the summary judgment holding. (Castellano's new counsel did not appear in the case until approximately nine months after that ruling; but, of course, he had constructive, if not actual, knowledge of it.) Again, the record does not reveal why, in opposing JMOL, Castellano made no mention of that controlling summary judgment holding.

In ruling on the motions, the court granted the City's but denied those of the remaining Defendants. Without explanation, it denied judgment for Fragozo and Sanchez. Restated, the magistrate judge made no mention of the Fourth versus Fourteenth Amendment issue.

After the remaining Defendants presented evidence, and prior to the case going to the jury, those Defendants, during the charge conference, renewed their JMOL motions, being

allowed by the court to adopt their earlier arguments. The motions were summarily denied.

The charge, apparently prepared by the magistrate judge, makes no mention of Fourth Amendment seizure. Instead, as quoted earlier, it speaks of Fourteenth Amendment "due process". At the charge conference, however, no reference, much less objection, was made to such use of Fourteenth Amendment "due process" instead of Fourth Amendment "seizure".

As noted, the jury found for Castro. Post-verdict, Sanchez and Fragozo moved for JMOL or, in the alternative, for a new trial. One basis urged for JMOL, as noted by the district court, was "because there is no constitutional cause of action for malicious prosecution". Citing its earlier summary judgment holding, the court stated it had

> already ruled on Sanchez's and Fragozo's contentions regarding this issue. (Docket no. 132 [the summary judgment ruling]). The parties do not present any new evidence or argument to persuade the Court to change its position on this issue.

But, again, the court failed to *explain why* it had instructed the jury on *due process* when it had held the § 1983 claim was grounded in the Fourth, not the Fourteenth, Amendment.

In the light of the foregoing events, this panel is faced with many interesting and perplexing procedural questions, about which there is not a great deal of case law. Does the law of the case trump the failure to object? As permitted in certain instances by our circuit precedent, *see, e.g.*, ***Thompson & Wallace of Memphis, Inc. v. Falconwood Corp.***, 100 F.3d 429, 432 (5th Cir. 1996), did the arguments

presented in support of the pre-verdict JMOL motions constitute sufficient objections to the charge, especially since, during the charge conference, the court allowed the renewed JMOL motions to simply adopt the arguments made only a few hours earlier, prior to the brief evidence presented by the remaining Defendants?

These questions need not be addressed. Assuming the majority is correct that we review only for plain error, there is reversible error. Of course, the instructions must be viewed as a whole. ***See United States v. Peterson***, 244 F.3d 385, 395 (5th Cir.), *cert. denied*, 534 U.S. 857, 122 S. Ct. 133, 151 L. Ed. 2d 86 (2001), *and cert. denied*, 534 U.S. 861, 122 S. Ct. 142, 151 L. Ed. 2d 94 (2001).

It was "clear" or "obvious" error to instruct on Fourteenth Amendment due process, because the district court's summary judgment holding precluded that ground. Moreover, in the light of ***Albright*** and our subsequent case law interpreting it, the identification of the "right to due process" as the constitutional right at issue in a § 1983 malicious prosecution claim was an obviously incorrect statement of the law.

The next inquiry is whether this error affected the substantial rights of Fragozo and Sanchez. Militating *against* holding that the error had such an effect is the fact that, although the district court misnamed the constitutional right at issue, the jurors were instructed they could find for Castellano *only* if they found each of the common-law elements was satisfied. And, as discussed, apparently under our circuit precedent, the elements amounted to the violation, regardless of how the court erroneously labeled it.

Nevertheless, using the words "constitutional right of due process" instead of "constitutional right against unreasonable seizure" probably altered the verdict. The jury's damages findings were keyed to the entire criminal proceeding -- as instructed, "acts that deprived [Castellano] of due process" -- instead of the more discrete "seizure" violative of the Fourth Amendment. Reading the instructions as a whole, as we must, the clear error was further compounded by the interrogatories to the jury, which asked, for example, whether Defendants "deprived Castellano of his constitutional *rights* [note the plural form] by committing malicious prosecution". (Emphasis added.) Throughout, for liability and damages, the interrogatories speak of the "violation of [Castellano's] constitutional rights".

Viewing the instructions as a whole, this harkens to the "generalized" and "open-ended" concept of substantive due process rejected in ***Albright***. As a result, Fragozo and Sanchez, in their individual capacities, were each found liable for *$1.5 million* for causing the brief, albeit unreasonable, arrest and detention of Castellano. In that light, the district court's error affected their substantial rights.

Concerning the last (discretion) prong in our analysis for reversible plain error, a $3-million compensatory damage award for *a constitutional tort that does not exist* (§ 1983 malicious *prosecution grounded in due process*) "seriously affects the fairness of" this trial. ***Olano***, 507 U.S. at 732. Likewise, permitting such damages to stand would seriously affect the "integrity [and] public reputation of [these] proceedings". ***Id.*** Accordingly, I would hold that the erroneous instruction constituted reversible plain error.

III.

For the foregoing reasons, it is hoped that en banc review will be granted for this case to not only correct the reversible error caused by the jury instructions, but also to correct our "confused and confusing" precedent for § 1983 malicious prosecution claims. I respectfully dissent.

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL NO. SA-96-CA-346-JWP

[Filed April 13, 2000]

ALFRED CASTELLANO, Plaintiff,	)
v.	)
CHRIS FRAGOZO, ALFRED CASTRO, MARIA SANCHEZ and the CITY OF SAN ANTONIO, Defendants.	)

JUDGMENT

In accordance with the court's ruling on the motion of defendant City of San Antonio for judgment as a matter of law and in accordance with the verdict of the jury rendered on April 17, 2000;

It is **ORDERED** that plaintiff Alfred Castellano recover nothing from defendants' City of San Antonio and Alfred Castro and that the claims against those defendants are

DISMISSED WITH PREJUDICE. Costs for those claims are taxed against plaintiff.

It is further **ORDERED** that plaintiff Alfred Castellano recover the sum of three million five hundred thousand dollars ($3,500,000) from defendants Chris Fragozo and Maria Sanchez, being apportioned as one million five hundred thousand dollars ($1,500,000) in compensatory damages and two hundred fifty thousand dollars ($250,000) in punitive damages from defendant Chris Fragozo, and one million five hundred thousand dollars ($1,500,000) in compensatory damages and, two hundred fifty thousand dollars ($250,000) in punitive damages from defendant Maria Sanchez. Interest on this amount shall accrue at the rate of 6.197% from the date of judgment. Costs for these claims are taxed against defendants Fragozo and Sanchez equally. Attorneys' fees shall be addressed by post-judgment motion.

SIGNED this 18th day of April, 2000.

/s/_____

JOHN W. PRIMOMO
United States Magistrate Judge

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL NO. SA-96-CA-346-JWP

[Filed April 14, 2000]

ALFRED CASTELLANO,)
Plaintiff,)
)
v.)
)
CHRIS FRAGOZO, et al.,)
Defendants.)
)

COURT'S INSTRUCTIONS TO THE JURY

Members of the Jury:

I will now give you instructions concerning the law applicable to this case. It is your duty as jurors to follow the law as I state it to you, whether you agree with the law or not, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

In deciding the facts of this case you must not be swayed by bias or prejudice as to any party. You must carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

It is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record. Remember that any statements, objections or arguments made by the lawyers are not evidence in the case.

Evidence can be either direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence, that is, proof of a chain of facts from which you could find that another fact exists, even though it has not been proved directly. So, while you may consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of reason, common sense, and experience. The law permits you to give equal weight to both direct and circumstantial evidence, but it is for you to decide how much weight to give any evidence.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to the testimony. In weighing the testimony of any witness you should consider his/her relationship to the plaintiff or to the defendants; his/her interest, if any, in the outcome of the

case; his/her manner of testifying; his/her opportunity to observe or acquire knowledge concerning the facts about which he/she testified; his/her candor, fairness and intelligence; and the extent to which he/she has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he/she testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony. If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

If scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and state an opinion concerning such matters. Merely because an expert witness has expressed an opinion does not mean that you must accept this opinion. The same as with any other witness, it is up to you to decide whether you believe this testimony and choose to rely upon it. In making this determination, you should consider the witness's background or training and experience, and whether the witness's opinions were based on sound reasons, judgment, and information.

The burden is on plaintiff Castellano in a civil action such as this to prove every essential element of his claim by a "preponderance of the evidence." A preponderance of the evidence means such evidence which has more convincing

force than the evidence opposed to it, and which produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a "preponderance of the evidence" simply means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

Substantive Issues:

1. MALICIOUS PROSECUTION

Plaintiff, Alfred Castellano, asserts a claim under the Civil Rights Act, contending the defendants maliciously prosecuted him for arson. Under the Civil Rights Act, a person may sue for an award of damages against anyone who, under color of state law, intentionally violates his rights protected by the Constitution of the United states. Castellano claims that Alfred Castro and Chris Fragozo, while acting under color of law, intentionally violated his constitutional right to due process by maliciously prosecuting him for the criminal offense of arson. Castellano further claims that Maria Sanchez, as an individual, intentionally violated the same constitutional right.

To prove such violation, Castellano must prove each of the following by a preponderance of the evidence:

(1) The defendants intentionally committed acts that deprived him of due process;

(2) In so doing, the defendants acted under "color of law" of the State of Texas; and

(3) the defendants' acts caused his damages.

First, to prove the defendants intentionally committed acts depriving him of due process, Castellano must prove they maliciously prosecuted him for the criminal offense of arson. To prove this claim, Castellano must establish by a preponderance of the evidence each of the following:

(1) The defendants caused or commenced or aided a criminal proceeding against him;

(2) The defendants acted without probable cause;

(3) The criminal action terminated in his favor;

(4) He was innocent of arson;

(5) The defendants acted with malice by prosecuting him for arson; and

(6) He was damaged by the criminal proceeding.

You are instructed that "Probable cause" means a person had within their knowledge trustworthy information sufficient to warrant a reasonable person to believe a particular person has committed or was committing a crime. The fact that Castellano's conviction was overturned, or his guilt or innocence, should not factor into this probable-cause determination. Your determination of the fifth prong, malice, should also not factor into your probable-cause determination.

In relation to the fourth prong, a person commits the offense of arson if he intentionally and knowingly starts a fire with intent to destroy or damage a building, knowing that the building is within the city limits and knowing that the building is insured. A person also is criminally responsible for arson, or commits arson, if the person acts with intent to promote or assist the arson, or solicits, encourages, directs, aids, or attempts to aid another person to commit arson.

A person acts with "malice" under the fifth prong if he intentionally commits a wrongful act without just cause or excuse. A person's failure to fully and fairly disclose all material information and knowingly providing false information to the prosecutor are relevant to the malice and causation elements of a malicious prosecution claim but have no bearing on probable cause.

To determine whether Maria Sanchez committed malicious prosecution you must also determine that she conspired with another while the other was acting under color of law, and they conspired with the intent to commit malicious prosecution. A conspiracy exists when a person acts in concert with another with the specific intent to violate a person's constitutionally protected right.

In this case, the parties have agreed that Alfred Castro and Chris Fragozo acted "under color of law," and you must accept this fact as proven.

Finally, Castellano must prove by a preponderance of the evidence that the defendants' actions caused damages. To do this, Castellano must first prove that the wrongful acts played a substantial part in bringing about any injury or damages. Second, Castellano must prove the injury or damage was a reasonably foreseeable consequence of the wrongful acts.

If you find Castellano has proven his claim, you must then consider whether the defendants Castro and Fragozo have proven their affirmative defense that their conduct was objectively reasonable in light of the legal rules clearly established at the time and, therefore, are not liable.

Officers are presumed to know about the clearly established constitutional rights of citizens. To determine whether their conduct was objectively reasonable, you must consider the scope of discretion and responsibility generally given to law enforcement officers in the performance of their duties, and consider all of the surrounding circumstances of the case as they would have reasonably appeared to the officers at the time of the prosecution. If, after these considerations, you find from a preponderance of the evidence that Castellano has proved either (1) that the defendants were plainly incompetent, or that (2) they knowingly violated the law regarding Castellano's constitutional rights, you must find for Castellano. If, however, you find that the defendants Castro and Fragozo proved they had a reasonable belief that their actions did not violate Castellano's constitutional rights, then you cannot find them liable, even if Castellano's rights were in fact violated as a result of Castro's or Fragozo's objectively reasonable action.

DAMAGES

If you find that Castellano was maliciously prosecuted by any of the defendants, then you must determine an amount that is fair compensation for all of Castellano's damages. The purpose of these compensatory damages is to make Castellano whole - that is, to compensate Castellano for the damage that Castellano has suffered. Compensatory damages are not limited to just the out-of-pocket expenses that Castellano may have incurred because of his injury. You may award damages

for any injury that Castellano sustained, including any mental anguish, loss of earning potential, and/or loss of capacity for enjoyment of life that Castellano experienced in the past. However, Castellano's compensatory damages may not include actual damages to Fred's Fish Fry, Inc. as a result of the fire or any malicious prosecution. Castellano's damages in relation to Fred's Fish Fry may only include his own damages you find resulted from any damages to Fred's Fish Fry, Inc. as a consequence of any of the defendants' malicious prosecution. There is no exact standard for fixing the compensation to be awarded for these elements of damage. Any award that you make should be fair in the light of the evidence.

If the plaintiff has proved that the defendants acted with malice or willfulness or with callous and reckless indifference to the safety or rights of others, you also may award punitive damages against them. One acts willfully or with reckless indifference to the rights of others when he acts in disregard of a high and excessive degree of danger about which he knows or which would be apparent to a reasonable person in his condition.

If you determine that the defendant's conduct was so shocking and offensive as to justify an award of punitive damages, you may exercise your discretion to award those damages. In making any award of punitive damages, you should consider that the purpose of punitive damages is to punish a defendant for shocking conduct, and to deter the defendant and others from engaging in similar conduct in the future. The law does not require you to award punitive damages, however, if you decide to award punitive damages, you must use sound reason in setting the amount of the damages. The amount of an award of punitive damages must not reflect bias, prejudice, or sympathy toward any party.

However, the amount can be as large as you believe necessary to fulfill the purposes of punitive damages. You may consider the financial resources of the defendant in fixing the amount of punitive damages.

* * * * *

When you retire to the jury room to deliberate on your verdict, you may take these instructions with you, as well as exhibits which the Court has admitted into evidence. Select your Foreperson and conduct your deliberations. If you recess during your deliberations, follow all of the instructions that the court has given you about your conduct during the trial. If you want to communicate with me at any time, please give a written message or question to the bailiff, who will bring it to me. I will then respond as promptly as possible either in writing or by having you brought into the courtroom so that I can address you orally.

Your verdict must be unanimous. After you have reached a unanimous verdict, your Foreperson is to fill in your answers to the questions. Do not reveal your answers until such time as you are discharged, unless otherwise directed by me. You must never disclose to anyone, not even to me, your numerical division on any question.

No. 03-1269

IN THE

Supreme Court of the United States

ALFRED CASTELLANO,

Petitioner,

v.

CHRIS FRAGOZO and MARIA SANCHEZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a 42 U.S.C. § 1983 malicious prosecution claim exists under the Fourth Amendment.

2. What damages are recoverable under a § 1983 Malicious prosecution claim under the Fourth Amendment.

3. Whether Fed. R. Civ. P. 51 requires a plain error review where the Respondent's failed to object to the jury charge, stating distinctly the matter objected to and the grounds of the objection, and if so, whether the jury instruction in this case constitutes plain error?

4. Whether the *Parratt* doctrine prohibits a federal remedy under the Due Process Clause of the Fourteenth Amendment where state common law provides an adequate remedy?

PARTIES TO THE PROCEEDINGS

Petitioner, Alfred Castellano was the Plaintiff-Appellant in the Fifth Circuit below, and Plaintiff in the District Court. Respondents Chris Fragozo and Maria Sanchez were the Defendants-Appellants in the Fifth Circuit below, and Defendants in the District Court. The City of San Antonio and Alfred Castro were Defendants in the District Court but were not parties in the appellate proceedings below.

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OPINIONS BELOW

The Fifth Circuit Court of Appeal's *en banc* decision is published at *Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003). (Pet. App. 2a)[1]. No party sought rehearing of the Fifth Circuit's *en banc* decision. The Fifth Circuit's opinion granting Cross-Petitioners' Petition for Rehearing *En Banc* is published at *Castellano v. Fragozo*, 321 F.3d 1203 (5th Cir. 2003) (Pet. App. 73a). The Fifth Circuit panel decision is published at *Castellano v. Fragozo*, 311 F.3d 689 (5th Cir. 2002). (Pet. App. 75a). The District Court's Order of Judgment is unpublished. (Pet. App. 165a).

STATEMENT OF JURISDICTION

The Respondents do not dispute the Petitioner's statement concerning this Court's jurisdiction being invoked in this case pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTE, AND RULE INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation,

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1. As authorized by Supreme Court Rule 12.5, Respondents have not reproduced herein the materials already produced in Petitioner's Petition in Appendix A through E, numbered 1a -175a. This material is referred to as "Pet. App." herein.

> and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

The Fourteenth Amendment Due Process Clause provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws.

U.S. Const. Amend. XIV, § 1.

Section I of the Civil Rights Act of 1871, as amended, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress, except that in any

> action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2000).

Rule 51 of the Federal Rules of Civil Procedure, as amended, provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT OF THE CASE

Respondents, with a few exceptions, do not dispute the Petitioner's statement of the case.[2] However, Respondents consider it important to clarify that Fragozo was not employed by Fred's Fish Fry, Inc. at the time of the arson and had not been for several months. Additionally, Castro was in fact a fireman assigned to the arson investigation squad, and not a police officer as suggested by Petitioner's statement of the case.

Additionally, Respondent believes the events that led to reversal and dismissal of Petitioner's conviction for arson upon his third habeas corpus attempt need to be clarified. Petitioner's conviction was upheld upon direct appeal, and his first two habeas petitions were denied by the trial court without hearing.

Upon his third petition for post-conviction habeas corpus relief, the trial court granted an evidentiary hearing at which Clemencia Jimenez was the primary witness to testify on Petitioner's behalf, and neither Respondent herein was called to testify nor given an opportunity to respond in opposition to her testimony. Consequently, the trial court made findings of fact and conclusions of law which recited that "Clemencia Jimenez was a credible witness and her testimony was neither contradicted nor rebutted.[3] The Texas Court of Criminal Appeals' opinion was, therefore, handed down without either Respondent herein having been provided an opportunity to

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2. For the most part, Petitioner's statement of the case is a verbatim recitation from the Fifth Circuit's *en banc* decision. Pet. App. 4a - 6a.

3. *See Ex Parte Castellano*, 863 S.W.2d 476, 479 (Tex. Crim. App. 1993).

defend themselves from the accusations by Jimenez. Furthermore, at the trial of this case in federal court, the trial court granted Respondents' motion in limine as to the specific findings of the Texas Court of Criminal Appeal and allowed Petitioner to merely present evidence that his conviction was reversed for insufficient evidence.

Finally, Respondent believes Petitioner has misstated the relief accorded by the Court of Appeals. The Court of Appeals remanded the case for a new trial on Petitioner's federal and state claims under the Fourth and Fourteenth Amendments and any state claims he may have.

REASONS FOR DENYING THE PETITION

1. Respondents concede the existence of a conflict among the United States Courts of Appeals regarding whether a 42 U.S.C. § 1983 malicious prosecution claim, standing alone, exists under the Fourth Amendment, but argue Petitioner waived any review by this Court.

Respondents concede that the Courts of Appeals are in conflict regarding whether a malicious prosecution claim, standing alone, violates the Fourth Amendment, and is therefore actionable pursuant to 42 U.S.C. § 1983. In fact, this Court, citing from the Court of Appeals' decision in the *Albright* case, noted that to "the extent to which a claim for malicious prosecution is actionable under § 1983 is one 'on which there is an embarrassing diversity of judicial opinion.'" *Albright v. Oliver*, 510 U.S. 266, 270 n.4 (1994) (citing from *Albright v. Oliver*, 975 F.2d 343, 345 (7th Cir. 1992), which cited from *Brummet v. Camble*, 946 F.2d 1178, 1180 n.2 (5th Cir. 1991). In this regard, the Fourth, Sixth, Seventh and Eleventh Circuits have rejected the view that a plaintiff must

simply satisfy the elements of an analogous common law tort of malicious prosecution in order to state a claim under § 1983. *See, e.g., Lambert v. Williams*, 223 F.3d 257, 262-62 & n.2 (4th Cir. 2000); *Franz v. Village of Bradford*, 245 F.3d 869, 877 (6th Cir. 2001); *Newsome v. McCabe*, 256 F.3d 747, 750 (7th Cir. 2001); *Penn v. Harris*, 296 F.3d 573, 576 (7th Cir. 2002); and *Whiting v. Traylor*, 85 F.3d 581, 584 (11th Cir. 1996). The Fifth Circuit has now adopted that position. *Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003). More recently, the Tenth Circuit joined this view. *Pierce v. Gilchrist*, 359 F.3d 1279, 1290 (10th Cir. 2004).

Some of the other circuits, that is, the First, Second, Third and Ninth Circuits, have taken the opposite view that a plaintiff may state a cause of action for a constitutional malicious prosecution action by satisfying the elements of a common law malicious prosecution claim. *See, e.g., Nieves v. McSweeney*, 241 F.3d 46, 52 (1st Cir. 2001); *Singer v. Fulton County Sheriff*, 63 F.3d 110, 116 (2d Cir. 1995); *Donahue v. Gavin*, 280 F.3d 371, 380 n.16 (3d Cir. 2002); and *Poppell v. City of San Diego*, 149 F.3d 951, 961-63 (9th Cir. 1998).

Notwithstanding the admitted diversity on this issue, Respondents argue that Petitioner's failure to appeal the lower court's consolidation of the state law malicious prosecution action with the § 1983 claim should bar this Court's review of this issue. Moreover, as stated by Judge Barksdale below, the Petitioner ". . . turned his back on the one claim he had under federal law — the Fourth Amendment." (Pet. App. A. p. 68a). Instead, Petitioner argued in the Court of Appeals that the judgment below was correct. Petitioner should not be allowed to present the question of the existence of a Fourth Amendment malicious prosecution claim under 42 U.S.C. § 1983 for the first time to this Court. Respondents therefore respectfully request this Court deny Petitioner's Petition on this question.

2. It is unnecessary to grant this petition on Petitioner's question concerning damages recoverable under a § 1983 malicious prosecution claim under the Fourth Amendment since a review of damages is not before this Court.

Petitioner requests this Court to decide what damages are recoverable under a § 1983 malicious prosecution claim under the Fourth Amendment, yet this inquiry is moot herein since the Fifth Circuit's *en banc* decision reversing and remanding the judgment in this case vacated all damages in this case. Depending on this Court's decision whether to review this case, and ultimate ruling, it will most likely be necessary to remand this case to the Fifth Circuit, or the trial court for retrial and consideration of damages, if any. Until that occurs, any examination of damages recoverable under a § 1983 malicious prosecution claim under the Fourth Amendment, if one exists at all, would be theoretical and result in an unnecessary advisory opinion by this Court. In any event, with regard to damages for a § 1983 claim for violation of constitutional rights, this Court has provided a starting point for consideration of damages in *Cary v. Piphus*[4] when it observed:

> Over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the injury under § 1983.

The Court should, therefore, refuse to grant this petition as to this question.

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4. 435 U.S. 247, 257-58 (1978).

3. It is unnecessary to grant this petition on Petitioner's question concerning plain error review since the Fifth Circuit's decision in this case did not hinge on error in the jury instructions.

In his petition, Petitioner argues that ". . . all of the questions /in this case/ should have been moot . . .", and that the Fifth Circuit, ". . . deviated from accepted appellate practice and willfully ignored Federal Rule of Civil Procedure 51, applying an abuse of discretion standard rather than a plain error review to the jury charge." (Pet. 22-23). The Fifth Circuit's *en banc* decision held that " 'malicious prosecution' standing alone is no violation of the United States Constitution, and to proceed under 42 U.S.C. § 1983 such a claim must rest upon a denial of rights secured under federal and not state law." (Pet. App. 2a). It did not primarily hinge on error in the jury instructions.

With regard to the jury instructions, the Fifth Circuit *en banc* opinion states, "under the unique circumstances of this case, we apply an abuse of discretion standard, rather than plain error." (Pet. App. 29a). However, in doing so, the Court notes that the Defendants did:

> object to allowing the jury to consider wrongful conviction as a claim under the Fourth and Fourteenth Amendments, making their legal position clear to the magistrate judge both by their motions for judgment as a matter of law, as well as by explicit renewal of those motions at the charge conference in response to the judge's invitation to lodge any objections to the proposed charge. Moreover, defendants' appeal from the district court's denial of judgment as a matter of

> law, and its rejection of the contention that the Fourth Amendment would not support claims arising from the trial.

(Pet. App. 30a).

Furthermore, in a footnote, the Court of Appeals further clarified its basis for applying an abuse of discretion standard to this case stating:

> Nevertheless, given the unusual procedural history of this case, and the fact that the nature of the defendants' continued objections to submitting the case went to the heart of this error, an abuse of discretion standard is appropriate.

(Pet. App. 30a n.8).

While taking great pains to explain its reason for applying an abuse of discretion standard to this case in light of Respondent's continued objections to the legal issues raised by this cause, it is clear that the Fifth Circuit did not arbitrarily chuck Rule 51 out the window while deciding which standard of review to apply to this cause as suggested by Petitioner, but rather took a well-reasoned approach in applying the abuse of discretion standard to this case. The Fifth Circuit has stated that "no party has the power to control our standard of review. A reviewing court may reject both parties approach to the standard." *United States v. Vontsheen*, 950 F.2d 1089, 1091 (5th Cir. 1992). The Fifth Circuit did not act arbitrarily in deciding that Rule 51 was not the appropriate standard of review to apply to this case. This Court should not second guess the Fifth Circuit's application of the abuse of discretion standard and should not grant the petition as to this question for review.

4. It is unnecessary to grant this petition for certiorari on the question whether the *Parratt*[5] doctrine prohibits a federal remedy under the Due Process Clause of the Fourteenth Amendment where state common law provides an adequate remedy.

Petitioner seeks review of whether the *Parratt* doctrine applies in the context of the Fifth Circuit's newly recognized Fourteenth Amendment cause of action. In support of his request for review on this issue, Petitioner points to Judge Jones' acknowledgment of Judge Barksdale's powerful argument for the application of the *Parratt* doctrine to this case, and that Judge Jones, while apparently somewhat persuaded by that argument, feels compelled to adhere to the other circuits' allowance of similar claims without application of *Parratt* in the absence of guidance from this Court. "While this position may prove correct, we have no post-*Parratt* guidance from the Supreme Court, . . . " (Pet. 22, Pet. App. 46a-47a).

Obviously, the Fifth Circuit did not apply the *Parratt* doctrine to the case *sub judice.* Moreover, the focus of this case is the existence of a 42 U.S.C. § 1983 malicious prosecution claim under the Fourth Amendment, as stated in Petitioner's other questions. Petitioner's claim should therefore be analyzed under the Fourth Amendment without reference to the more general considerations of due process, and his petition for review of the applicability of the *Parratt* doctrine to the facts of this case denied. In fact, the Fifth Circuit's *en banc* ruling expressly held that *Parratt* was inapplicable, stating:

> . . . (A) state's manufacturing of evidence and knowing use of that evidence along with perjured

5. *Parratt v. Taylor*, 451 U.S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981).

> testimony to obtain a wrongful conviction deprives a defendant of his long recognized right to a fair trial secured by the Due Process Clause, a deprivation of a right not reached by *Parratt*.

(Pet. App. A. 3a),

. . .

> Nor is there serious suggestion that the *Parratt* doctrine is applicable to *Castellano's* claim that the manufacturing of evidence and use of perjured testimony at trial leading to his wrongful conviction denied him due process.

(Pet. App. A. 35a),

. . .

> . . . (W)hile *Castellano's* due process claims are not properly rejected by the principles of *Albright* and *Parratt*, whether they survive the absolute immunity given witnesses in a criminal trial or whether the fabrication of the tapes could have been a legally sufficient cause of the wrongful conviction, we leave to the district court on remand.

(Pet. App. A. 39a).

However, in the event this Court determines a due process analysis of this claim is appropriate, Respondents believe this Court should review the applicability of the *Parratt* doctrine to the facts of this case.

CONCLUSION

This Petition for Writ of Certiorari should be denied. However, in the event it is granted, Respondents submit that, to accord fairness and complete justice in this case, the Court should also grant their Conditional Cross-Petition for Writ of Certiorari.

Respectfully submitted,

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